DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-929
Title: Atlantic Marine Construction Company, Inc., Petitioner
v.
United States District Court for the Western District of Texas, et al.
Docketed: January 25, 2013
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (12-50826)
Decision Date: November 19, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jan 25 2013	Petition for a writ of certiorari filed. (Response due February 25, 2013)
Feb 25 2013	Brief of respondent J-Crew Management, Inc. in opposition filed.
Feb 25 2013	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Feb 25 2013	Brief amicus curiae of Texas Civil Justice League filed.
Mar 7 2013	Reply of petitioner Atlantic Marine Construction Company, Inc. filed.
Mar 13 2013	DISTRIBUTED for Conference of March 29, 2013.
Apr 1 2013	Petition GRANTED.
Apr 22 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 17, 2013.
Apr 22 2013	The time to file respondents' brief on the merits is extended to and including August 16, 2013.
May 16 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
May 21 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the resondent.
Jun 17 2013	Brief of petitioner Atlantic Marine Construction Company, Inc. filed.
Jun 17 2013	Joint appendix filed. (Statement of costs received.)
Jun 24 2013	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Jun 24 2013	Brief amici curiae of New England Legal Foundation, et al. filed.
Jun 24 2013	Brief amicus curiae of Professor Stephen E. Sachs in support of neither party filed.
Jul 22 2013	CIRCULATED.
Jul 23 2013	SET FOR ARGUMENT on Wednesday, October 9, 2013.
Aug 2 2013	Record from U.S.C.A. fo 5th Circuit is electronic.

Aug 2 2013	Record from U.S.D.C. for Western District of Texas is electronic.
Aug 16 2013	Brief of respondent J-Crew Management, Inc. filed. (Distributed)
Aug 23 2013	Motion of Professor Stephen E. Sachs in support of neither party for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 23 2013	Brief amicus curiae of American Subcontractors Association filed. (Distributed)
Aug 26 2013	Petitioner's response in opposition to motion of Professor Stephen E. Sachs.
Aug 30 2013	Respondents' opposition in response to motion of Professor Stephen E. Sach.
Sep 11 2013	Respondents' amended opposition to motion of Professor Stephen E. Sachs
Sep 16 2013	Reply of petitioner Atlantic Marine Construction Company, Inc. filed. (Distributed)
Oct 1 2013	Motion of Professor Stephen E. Sachs for leave to participate in oral argument as amicus curiae and for divided argument DENIED. The parties, however, should be prepared to address at oral argument the arguments raised in the brief of Professor Stephen E. Sachs as amicus curiae in support of neither party.
Oct 9 2013	Argued. For petitioner: William S. Hastings, Dallas, Tex. For respondents: William R. Allensworth, Austin, Tex.

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

12-929

No. 12-____

Supreme Court, U.S.
FILED
JAN 25 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

J-CREW MANAGEMENT, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Following the Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the majority of federal circuit courts hold that a valid forum-selection clause renders venue "improper" in a forum other than the one designated by contract. In those circuits, forum-selection clauses are routinely enforced through motions to dismiss or transfer venue under Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406. The Third, Fifth, and Sixth Circuits, however, follow a contrary rule. This Petition presents the following issues for review:

1. Did the Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), change the standard for enforcement of clauses that designate an alternative federal forum, limiting review of such clauses to a discretionary, balancing-of-conveniences analysis under 28 U.S.C. § 1404(a)?

2. If so, how should district courts allocate the burdens of proof among parties seeking to enforce or to avoid a forum-selection clause?

PARTIES TO THE PROCEEDING

The following list identifies all of the parties before the United States Court of Appeals for the Fifth Circuit.

The Petitioner below was Atlantic Marine Construction Company, Inc. The Respondent below was J-Crew Management, Inc.

Petitioner is a privately-owned corporation. No corporation owns 10% or more of Petitioner's shares.

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IN THE

Supreme Court of the United States

No. 12-___

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

J-CREW MANAGEMENT, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Atlantic Marine Construction Company, Inc. ("Atlantic Marine") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals' opinion (Pet. 1a), including Judge Haynes' special concurrence (Pet. 14a), is reported: *In re Atlantic Marine Construction Co., Inc.*, 701 F.3d 736 (5th Cir. 2012). The district court's decision that is subject to this Petition is reprinted in the Appendix. (Pet. 26a).

JURISDICTION

The court of appeals entered judgment on November 19, 2012. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

This Petition requires an analysis of two federal venue statutes in Title 28, United States Code:

§ 1404. Change of Venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

§ 1406. Cure or Waiver of Defects.

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

This Petition also raises an issue under Rule 12(b)(3) of the Federal Rules of Civil Procedure:

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (3) improper venue[.]

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed.

INTRODUCTION

The contractual right to select the forum for a lawsuit in advance of any controversy is important to commerce and the administration of justice. As Justice Kennedy explained:

> enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system.
>
> * * *
>
> The federal judiciary has a strong interest in the correct resolution of these questions, not only to spare litigants unnecessary costs but also to relieve courts of time-consuming pretrial motions. Courts should announce and encourage rules that support private parties who negotiate such clauses.

Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy J. concurring).

Since 1988, federal circuit courts have struggled to understand the meaning of the Court's majority opinion in *Stewart*. They are divided on the question whether (a) a valid forum-selection clause designating a federal forum renders venue "improper" for purposes of Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406(a) in a venue other than the one chosen by the parties in their contract, or (b) the forum-selection clause is just a factor to consider in the discretionary, balancing analysis for convenience transfers under 28 U.S.C. § 1404(a). *See* 17 MOORE'S FEDERAL PRACTICE § 111.04 (3d ed. 2012) (discussing the circuit split).

The majority of federal circuit courts (including the Second, Seventh, Eighth, Ninth, and Eleventh Circuits) reads *Stewart* narrowly, and concludes that a valid forum-selection clause designating an alternative federal forum renders venue "improper" in a forum other than the one the parties selected. *See Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968, 970-73 (8th Cir. 2012); *TradeComet LLC.com v. Google, Inc.*, 647 F.3d 472, 478 (2d Cir. 2011); *Slater v. Energy Servs. Grp. Int'l, Inc.*, 634 F.3d 1326, 1332-33 (11th Cir. 2011); *Hillis v. Heineman,* 626 F.3d 1014, 1016-17 (9th Cir. 2010); *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 760-62 (7th Cir. 2006).

The Fifth Circuit, however, adopted a minority position (shared with the Third Circuit and Sixth Circuit). (Pet. 5a); *see also Kerobo v. Southwestern Clean Fuels, Corp.*, 285 F.3d 531, 535 (6th Cir. 2002); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877-78 (3d Cir. 1995). The minority position finds an "implicit" holding in *Stewart* that limits review of such forum-selection clauses to a discretionary, balancing test under the convenience transfer rules of 28 U.S.C. § 1404(a). (Pet. 6a).

The standard employed is important. Under the majority view, a forum-selection clause would be enforced under the strict standard adopted in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). That is, a forum-selection clause will be enforced unless the party seeking to avoid the clause shows that it is unreasonable and unjust, or the product of fraud or overreaching. *Id.* at 15. J-Crew did not even attempt to meet the *Bremen* standard to avoid enforcement of the clause in its contract with Atlantic Marine. By following the minority view, the Fifth

Circuit upheld the district court's exercise of discretion and allowed J-Crew to avoid its contractual forum-selection clause based on a convenience analysis. (Pet. 5a).

Also ruling in conflict with other circuits, the Fifth Circuit placed the burden on Atlantic Marine to justify its request to enforce its contract, instead of requiring J-Crew to prove why the contract should not be enforced. (Pet. 9a-10a). If the Fifth Circuit (and minority position) is correct, it literally will be easier for a party to enforce a forum-selection clause requiring disputes to be resolved in the Republic of the Philippines, than to enforce a clause requiring a dispute to be resolved in federal court in Virginia. *See MarineChance Shipping Ltd. v. Sebastian*, 143 F.3d 216, 220-21 (5th Cir. 1998) (Wisdom, J.) (enforcing choice of a Philippine forum).

Fifth Circuit Judge Haynes disagreed with the Fifth Circuit Majority, and correctly recognized that enforcement of forum-selection clauses should not be left to the discretion of district courts:

> We should not leave the enforcement by specific performance of otherwise valid contractual forum selection clauses to the vicissitudes of virtually unfettered judicial discretion. Absent some compelling countervailing factor (something J-Crew does not even argue is present here), forum-selection clauses such as this one should be and should have been enforced by transfer or dismissal.

(Pet. 24a-25a). Judge Haynes found "no practical difference between this district court opinion and that of a district court that was assessing this same case without a forum-selection clause." (Pet. 24a). She

concluded: "Given the state of the law in this area, I encourage the parties to request review of today's decision by the United States Supreme Court . . . " (Pet. 25a).

This Court should grant review in this case to resolve the disagreement over the meaning of *Stewart*.

STATEMENT OF THE CASE

1. The United States Army Corps of Engineers contracted with Atlantic Marine, a Virginia corporation with its principal place of business in Virginia Beach, Virginia (just a few miles away from Norfolk, Virginia), for the construction of a child development center located in Ft. Hood (the "Prime Contract"). Atlantic Marine thereafter entered into a Subcontract Agreement with J-Crew (the "Subcontract") for the provision of construction labor and materials in connection with the Prime Contract. J-Crew claims Atlantic Marine failed to pay it for work performed as a subcontractor.

Subcontract Paragraph 12(b) contains a mandatory forum-selection clause:

> The Subcontractor agrees that all other disputes not included in subparagraph (a) above, shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division. The Parties hereto expressly consent to the jurisdiction and venue of said courts.[1]

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[1] Subparagraph (a) addresses subcontractor disputes for which the United States Government might be liable. It is not at issue here.

The forum-selection clause is applicable to all of J-Crew's claims against Atlantic Marine.

Ignoring the forum-selection clause, J-Crew filed suit against Atlantic Marine in the Austin Division of the Western District of Texas. Atlantic Marine moved to dismiss J-Crew's complaint under Fed. R. Civ. P. 12(b)(3) & 12(b)(6), and to dismiss or, alternatively, transfer the case to Virginia under 28 U.S.C. §§ 1406 and 1404(a). J-Crew opposed Atlantic Marine's motion, but did *not* challenge the forum-selection clause as being unreasonable and unjust, or that the clause was invalid for reasons such as fraud or overreaching.

The district court denied enforcement of the forum-selection clause. (Pet. 26a-44a). It held that Atlantic Marine could not seek enforcement of the clause under Fed. R. Civ. P 12(b)(3) and 28 U.S.C. § 1406. (Pet. 32a-35a). The district court also placed the burden on Atlantic Marine to show whether transfer under 28 U.S.C. § 1404(a) was appropriate. (Pet. 36a). The court concluded: "Atlantic has not carried its burden to demonstrate that transfer of this case to Virginia would be in the interest of justice or increase the convenience of the parties and their witnesses." (Pet. 40a). The district court refused to dismiss the case or transfer it to Virginia.

2. Atlantic Marine filed a Petition for Writ of Mandamus to the United States Court of Appeals for the Fifth Circuit seeking review of the district court's order. The Fifth Circuit recognizes (as have several other circuits) that mandamus is the only vehicle available to obtain appellate review of the denial of a motion seeking to change the venue of a lawsuit. *See, e.g., In re Volkswagen of America, Inc.*, 545 F.3d 304, 309-10, 318-19 (5th Cir. 2008) (en banc); *In re*

National Presto Indus. Inc., 347 F.3d 662, 663 (7th Cir. 2003) (Posner, J.); *see also In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989) (granting mandamus to enforce forum-selection clause on remand from *Stewart*).

3. The Fifth Circuit denied Atlantic Marine's petition, (Pet. 13a), stating "we cannot find that the district court clearly abused its discretion." (Pet. 9a). The Court recognized the circuit split on enforcement of forum-selection clauses:

> [T]he choice between Rule 12(b)(3) and § 1406 on the one hand and § 1404 on the other depends on whether private parties can, through a forum-selection clause, render venue improper in a court in which venue is otherwise proper under § 1391. Federal circuit courts are divided on the issue.

(Pet. 4a). The Fifth Circuit adopted the approach taken by "a minority of the federal appellate courts." (Pet. 5a). Under that approach, "when a forum-selection clause designates a specific federal forum or allows the parties to select the federal courts of a different forum, a motion to transfer under § 1404(a) is the proper procedural mechanism for enforcing the clause." (Pet. 5a).

Based on what it found "implied" and "implicit" in *Stewart*, not on what this Court said explicitly (Pet. 6a), the Fifth Circuit held: "*Stewart* teaches that Congress has by § 1404(a) removed the lateral transfer of cases among federal courts from the control of private contracts." (Pet. 11a). Thus, the Fifth Circuit concluded that a dismissal or transfer under Rule 12(b)(3) and § 1406 was not available. (Pet. 4a-8a, 13a). The Fifth Circuit concluded that the position

endorsed by Judge Haynes and followed by a majority of federal circuit courts would render *Stewart* "a dead letter." (Pet. 6a n.18).

The Fifth Circuit Majority began its review of the § 1404(a) balancing analysis by stating "we cannot conclude that the district court clearly abused its discretion by placing the burden on the movant" to show that a transfer was appropriate. (Pet. 9a). With the burden on Atlantic Marine, the court found that the district court did not abuse its discretion when balancing the relevant factors. (Pet. 9a-13a). The court upheld the denial of the motion to dismiss or transfer.

4. Judge Haynes filed a "special concurrence" in which she expressly disagreed with the Fifth Circuit Majority. Judge Haynes recognized that this Court "has made clear that forum-selection clauses are enforceable," but that the effect of the ruling in this case:

> is to make forum-selection clauses enforceable by specific performance only at the election of the district court, which is free to render a decision that evades practical review, given our substantial limits on mandamus review . . . and the practical unavailability of review on appeal following final judgment.

(Pet. 14a) (internal citations omitted). In response to the Fifth Circuit Majority's concern that private parties should not be able to "transcend federal venue statutes" by contract (Pet. 6a), Judge Haynes emphasized there is nothing novel or unusual about parties selecting among available venues in their contracts. (Pet. 16a-17a). "In so doing, the parties do not transcend federal law, but instead agree that neither will

seek to maintain venue in certain otherwise permissive forums." (Pet. 17a).

Judge Haynes agreed with the majority of federal circuit courts that allow forum-selection clauses to be enforced under Rule 12(b)(3) and § 1406. (Pet. 19a-20a). She wrote:

> A forum-selection clause that was negotiated and agreed to by sophisticated parties and is not challenged based on fraud, unreasonableness, or anything similar should be given effect. . . . Companies, such as Atlantic, that conduct business throughout a broad geographical area rely on forum-selection clauses to ensure that they can anticipate business costs and avoid litigation in a plethora of possible venues. Section 1406 seems to be the cleanest way to do so, treating the venue now "deselected" by the agreement as a "wrong" venue.

(Pet. 23a-24a). Judge Haynes recognized that *Stewart* did not address the issue of whether a forum-selection clause could be enforced under Rule 12(b)(3) and § 1406 "because the claim of 'improper venue' had been waived by the defendant." (Pet. 18a). She also noted that "the actual result of *Stewart* is exactly the opposite of the result reached here" because, on remand in *Stewart*, the Eleventh Circuit granted mandamus relief to enforce the forum-selection clause even under a Section 1404(a) convenience analysis. (Pet. 18a-19a). The Eleventh Circuit explained: "the clear import of [*Stewart*] is that the venue mandated by a choice of forum clause rarely will be outweighed by other 1404(a) factors." *In re Ricoh*, 870 F.2d at 573.

REASONS TO GRANT THE PETITION

The disagreement between the Fifth Circuit Judges is indicative of the larger, well-developed, circuit split on the issue whether a forum-selection clause that designates an alternative federal forum renders venue "improper" in a forum other than the one selected by contract. The Fifth Circuit's decision has deepened the divide, causing increased uncertainty about whether contractual forum-selection clauses will be enforced as written.

For cases filed within the Fifth Circuit (and in other jurisdictions following the minority view), enforcement of a forum-selection clause turns on the forum selected in the contract. Clauses designating an alternative *state* or *foreign* forum render venue "improper" in a federal court, whereas a clause designating an alternative *federal* court forum does not. (Pet. 7a-8a). In the first instance, one can expect routine enforcement of the clause under *Bremen*; in the latter, a Section 1404(a) balancing test with uncertain results. For cases filed in circuits following the majority approach, by contrast, one can expect consistent, routine enforcement of all contractual forum-selection clauses under the *Bremen* standard, so long as the objection to venue is timely raised. Thus, the forum where a case is filed now controls the level of deference given to the parties' contractual choice of forum, with the Third, Fifth, and Sixth Circuits giving much less deference, and much less certainty, to those clauses than is given by other circuits.[2]

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[2] Contracting parties cannot even write around this problem by trying to select a jurisdiction following the majority rule,

By granting this Petition, this Court will have the opportunity to end a long-running disagreement over the federal venue rules that has divided the circuit courts since this Court's decision in *Stewart*.

A. This Court Should Resolve the Well-Developed Circuit Split on Whether a Forum-Selection Clause Renders Venue Improper When It Calls for an Alternative Federal Forum

1. For over 40 years, this Court has recognized that the enforcement of contractual forum-selection clauses presents an issue of national importance that warrants this Court's consideration. Beginning with *Bremen*, the Court established a strong presumption favoring enforcement of forum-selection clauses, and set a high standard for those seeking to avoid their contractually-chosen forum:

> The correct approach would have been to enforce the forum clause specifically unless [the resisting party] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.

407 U.S. at 15. The burden on the party resisting enforcement of the clause requires a "strong showing that it should be set aside." *Id.*

This strong presumption recognizes that forum-selection clauses are often negotiated bargains in contracts. In many instances, parties will make concessions (such as changing pricing terms) in

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because there is no way to know in advance where the party that ignores the forum-selection clause will file suit.

return for receiving a more convenient, more familiar, and/or more certain venue for resolution of contractual disputes. Any claimed "inconvenience" associated with a chosen forum is something parties can take into account when they enter an agreement. *Id.* at 16-17. When the alleged inconvenience of the chosen forum is foreseeable at the time of contracting:

> it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.

Id. at 18. The Court even adheres to this strict enforcement of forum-selection clauses when the contract was not the subject of negotiation. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593 (1991). Contracting parties routinely use and rely upon forum-selection clauses, which "now appear in contracts of every description and, if anything, are being used with greater frequency." 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3803.1 at 50 (3d ed. 2007) (hereinafter "WRIGHT & MILLER").

2. In *Stewart*, this Court addressed (for the first and only time) a forum-selection clause in the context of a motion to transfer venue under 28 U.S.C. § 1404(a). The question presented was whether "the District Court's denial of the § 1404(a) motion constituted an abuse of discretion." *Stewart*, 487 U.S. at 28. As a threshold matter, the Court analyzed "the issue whether a federal court sitting in diversity should apply state or federal law in adjudicating a

motion to transfer a case to a venue provided in a contractual forum-selection clause." *Id.* at 24. The Court found that federal law controlled, meaning that an Alabama statute (which would have invalidated the forum-selection clause) would not control the outcome of the venue analysis. *Id.* at 30-33.

The Court then explained that "[t]he presence of a forum-selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the district court's calculus." *Id.* at 29. Although the Court did not give "dispositive" weight to the forum-selection clause in a Section 1404(a) analysis, the Court still found the rules from *Bremen* "instructive" in resolving the dispute. *Id.* at 28 & 31. In his concurrence, Justice Kennedy emphasized that "a valid forum-selection clause is given controlling weight in all but the most exceptional cases." *Id.* at 33.

3. Footnote 8 in *Stewart* is the source of much disagreement in the federal circuit courts. The Court wrote:

> The parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406(a) because respondent apparently does business in the Northern District of Alabama. *See* 28 U.S.C. § 1391(c) (venue proper in judicial district in which corporation is doing business).

Id. at 28 n.8. The majority of federal circuit courts have read this footnote as recognition that the issue whether venue was "improper" was not presented to the Court, and thus not addressed or decided by *Stewart*. *See* 17 MOORE'S FEDERAL PRACTICE § 111.04[4][a][ii] ("this issue technically was not before

the Court and therefore the Court's apparent endorsement of the use of Section 1404(a) arguably was dictum"). A minority of federal circuit courts have read *Stewart* as an implicit recognition that parties cannot, through a forum-selection clause, render a venue "improper" for purposes of Rule 12(b)(3) and 28 U.S.C. § 1406(a).

4. The Second, Seventh, Eighth, Ninth, and Eleventh Circuits follow the majority view, holding that a forum-selection clause calling for a federal court forum may be enforced through a motion to dismiss or transfer based on improper venue. *See Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968, 970-73 (8th Cir. 2012); *TradeComet LLC.com v. Google, Inc.*, 647 F.3d 472, 478 (2d Cir. 2011); *Slater v. Energy Servs. Grp. Int'l, Inc.*, 634 F.3d 1326, 1332-33 (11th Cir. 2011); *Hillis v. Heineman*, 626 F.3d 1014, 1016-17 (9th Cir. 2010); *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 760-62 (7th Cir. 2006).

5. In this case, the Fifth Circuit joined the Third and Sixth Circuits in holding that a forum-selection clause allowing for an alternative federal forum did not render venue improper in a forum other than the one chosen by contract, thereby limiting the court's review of venue to a discretionary analysis under § 1404(a). (Pet. 5a); *see also Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877-78 (3d Cir. 1995); *Kerobo v. Southwestern Clean Fuels, Corp.*, 285 F.3d 531, 535 (6th Cir. 2002).[3]

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[3] The Fourth, Tenth, and D.C. Circuits hold that a Rule 12(b)(3) motion to dismiss for improper venue is an appropriate vehicle to enforce a forum-selection clause, but those courts have not directly addressed that question in the context of a clause designating an alternative federal court venue. *See Sucampo Pharms. v. Astellas Pharma, Inc.*, 471 F.3d 544, 548-

6. Commentators have also struggled to understand the meaning of *Stewart* when read in context with this Court's decisions in *Bremen* and *Carnival Cruise Lines*. For example, in WRIGHT & MILLER, the authors have called *Stewart* an "underappreciated decision," in which the Court limited the applicability of *Bremen* and *Carnival Cruise Lines* to admiralty cases. WRIGHT & MILLER § 3803.1 at 74.[4] Others have gone even further, suggesting that the answer to the "tangled mess" left by the Court's "trio" of forum-selection clauses cases is that *Bremen* was not the watershed case most courts believe it to be—meaning that *Bremen* only applied in admiralty cases

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50 (4th Cir. 2006) (requiring Japanese forum); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir. 1992) (requiring English forum); *Commerce Consultants Int'l, Inc. v. Vetrerie Riunite*, 867 F.2d 697, 699-700 (D.C. Cir. 1989) (requiring Italian forum). Recently, however, district courts in the Fourth and Tenth Circuits have followed the majority approach and enforced forum-selection clauses calling for an alternative federal forum using an analysis based on improper venue. *See Smart Choice Constr., Inc. v. Ceco Bldg. Sys.*, 2012 WL 6025784 (W.D. Va. Dec. 3, 2012); *Montoya v. Fin. Fed. Credit, Inc.*, 872 F. Supp.2d 1251 (D.N.M. 2012).

The First Circuit has rejected that conclusion, but holds that a motion to dismiss based on a forum-selection clause should be treated as a Rule 12(b)(6) motion. *See Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 15 (1st Cir. 2009).

The Federal Circuit has not created its own rule on this issue because, as a matter of procedure, the Federal Circuit is bound to follow the decisions of the regional circuit court for the district from which an appeal is taken. *See Powertech Technology, Inc. v. Tessera, Inc.*, 660 F.3d 1301, 1310 (Fed. Cir. 2012) (applying Ninth Circuit rules when determining to enforce forum-selection clause).

[4] Although it did not expressly adopt its reasoning, the Fifth Circuit relied upon WRIGHT & MILLER when rendering its decision. (Pet. 6a).

and did not change the pre-1972 law for diversity and federal question cases. *See* David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 976-77 (2008) (hereinafter "MARCUS").

No federal circuit court has adopted such a constrained view of *Bremen* and such an expansive view of *Stewart*. To the contrary, "[f]ollowing *Bremen*, both state and federal courts adopted its rule of decision, not only in admiralty cases, but in virtually all forum selection settings, and it now clearly represents the weight of authority in the United States." 7 RICHARD A. LORD, WILLISTON ON CONTRACTS § 15.15 at 371 (4th ed. 2010); *see also* 17 MOORE'S FEDERAL PRACTICE § 111.04[4][a][iii] ("*The Bremen*, like *Carnival Cruise*, was an admiralty case, yet the lower courts have routinely imported its standards to a wide variety of non-admiralty cases, including diversity cases.").

Commentators recognize, however, that there is a deep divide over the meaning of the majority opinion in *Stewart*:

> The lower courts have differed as to whether *Stewart*'s apparent endorsement of the use of Section 1404(a) to enforce forum selection clauses was dicta or not, and, therefore, the debate about whether a forum selection clause makes venue improper or not continues.

See 17 MOORE'S FEDERAL PRACTICE § 111.04[4][a][ii] (internal cross-reference omitted). WRIGHT & MILLER explains:

> Not surprisingly, given this confusion surrounding forum-selection clause analysis, many lower

> federal courts have failed to distinguish between the approach taken in *Carnival Cruise* and that taken in *Stewart*.

WRIGHT & MILLER § 3803.1 at 79;[5] *see also* MARCUS at 973 ("Forum selection clause enforcement doctrine in the federal courts has splintered in a number of ways, making a clause enforcement decision in any particular case uncertain and confused.")

Atlantic Marine agrees with the majority of the federal circuit courts that have addressed this issue. The answer to the confusion is that *Stewart* is not a sweeping decision, limiting parties' contractual rights to select in advance the forum for litigation of disputes. Broad changes in doctrine are not made "implicitly" or through an ambiguously-worded footnote.

7. The Fifth Circuit's decision shows that the circuit-split regarding the meaning of *Stewart* is not going to resolve itself. During the last two years, three circuit courts joined the majority approach, but most recently, the Fifth Circuit emphatically joined the minority. Eight circuit courts have now expressly addressed the issue, and respected commentators are supporting a position not expressly adopted by any circuit. This Court should resolve this well-developed split in authorities, thereby providing certainty for parties when entering into contracts and efficiency when entering the courts.

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[5] The authors of WRIGHT & MILLER have called the distinction they draw between admiralty cases and other types of cases "curious." WRIGHT & MILLER § 3803.1 at 79. Nevertheless, they support a narrow reading of *Bremen* and *Carnival Cruise Lines* to draw that distinction. *See id.* at 70.

B. The Fifth Circuit Decision to Treat Enforcement of the Forum-Selection Clause as a Discretionary Issue under Section 1404(a) Is Fundamentally Flawed

On the merits, this Court should adopt the approach followed by the majority of federal circuit courts. The minority view leads to absurd results and encourages forum shopping.

1. A fundamental problem with the Fifth Circuit's view is that it leaves the enforcement of forum-selection clauses to the discretion of the district courts, but only with respect to forum-selection clauses allowing for an alternative *federal* forum. The Fifth Circuit holds: "When the forum-selection clause designates an *arbitral, foreign, or state court* forum, the federal district court is without power to transfer and thus must dismiss the case as long as it determines the forum-selection clause is enforceable." (Pet. 8a) (emphasis added). Accordingly, a dismissal for improper venue under Rule 12(b)(3) and Section 1406 is required. (Pet. 7a). When the forum-selection clause allows for an alternative federal forum, however, the Fifth Circuit holds that the clause does not render venue "improper." (Pet. 6a-8a). Accordingly, the Fifth Circuit's answer to the question whether parties can render venue improper by contract is "maybe, depending on the forum selected in the contract."

The Fifth Circuit's approach suffers from a logical flaw. The existence of a valid forum-selection clause either renders venue improper or it does not. The answer to that question should not depend upon the forum selected by the parties in their agreement. It should not be easier to enforce a forum-selection

clause requiring parties to travel overseas to resolve their dispute, than it is to enforce a clause requiring parties to go to federal court in Norfolk, Virginia.

The Fifth Circuit Majority's only attempt to reconcile its approach (finding that parties can render venue improper by contractually selecting a state or foreign jurisdiction) with its professed concern regarding the ability of private parties to "transcend federal venue statutes that have been duly enacted by Congress" is to claim that this distinction is necessary because federal law does not allow for transfers to state or foreign jurisdictions. (Pet. 6a-8a). The fact that the Fifth Circuit's approach draws a distinction based on a perceived necessity (rather than based on statutory language enacted by Congress) is a strong indicator that there is an error in the analysis elsewhere. That error is in failing to treat all forum-selection clauses the same. A valid forum-selection clause renders an otherwise available federal venue "improper" for those parties who agreed to a different forum. The approach endorsed by Judge Haynes and the majority of federal circuits allows for consistent, logical application in the business world and in court. The contrary, minority view leads to inconsistent, absurd results.

2. The Fifth Circuit's approach also encourages forum shopping. Even when a forum-selection clause is enforced under § 1404(a), the Fifth Circuit's approach alters the choice of law analysis for the case. Ordinarily, a federal court applies the choice of law rules of the forum in which the court sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). When a case is transferred for convenience under § 1404(a), the applicable law transfers with the case. *See Ferens v. John Deere Co.*, 494 U.S.

516, 524-25 (1990). But, when a case is dismissed for improper venue under Rule 12(b)(3) and re-filed in another court, or when a case is transferred for improper venue under § 1406, the law does *not* transfer with the case. *See Wisland v. Admiral Beverage Corp.*, 119 F.3d 733, 735-36 (8th Cir. 1997); *Ellis v. Great Sw. Corp.*, 646 F.2d 1099, 1110 (5th Cir. 1981); *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 992 (11th Cir. 1982); *Martin v. Stokes*, 623 F.2d 469, 473 (6th Cir. 1980). Accordingly, the decision regarding the rules to determine whether a forum-selection clause is enforced also controls the analysis of what law is going to govern when the case finds its proper home. *See Lafferty v. Riel*, 495 F.3d 72, 76 (3d Cir. 2007) ("Distinctions between §§ 1404(a) and 1406(a) have to do with discretion, jurisdiction, and choice of law.").

C. The Fifth Circuit Also Created a Circuit Split on the Burden to Prove that Transfer Is Appropriate under Section 1404(a) When a Forum-Selection Clause Is at Issue

Even if the Court determines that § 1404(a) is the proper vehicle to analyze forum-selection clauses allowing for an alternative federal forum, this case provides an excellent vehicle to provide guidance on the role of a forum-selection clause in the § 1404(a) analysis. The Fifth Circuit's decision creates a circuit split on the burden of proof under § 1404(a) when a valid forum-selection clause is at issue, and it adopts an analysis of that burden that cannot be squared with *Bremen*.

1. In *Stewart*, the Court left the balancing of factors under § 1404(a) to a future day. 487 U.S. at

32. Following *Stewart*, most courts to address the issue hold that a forum-selection clause shifts the burden of proof under the § 1404(a) analysis, requiring a party seeking to avoid a contractually-chosen forum to justify departure from the contract. *See In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995); *see also* 17 MOORE'S FEDERAL PRACTICE § 111.13[1][p][i][B] (3d ed. 2012) ("there should be a presumption in favor of enforcing the forum selection clause that shifts the burden to the plaintiff to come forward with a substantial, reasoned explanation as to why an agreement to litigate in a particular place, as set forth in the forum selection clause, should not be honored under the circumstances."). That approach is consistent with the allocation of the burden in *Bremen*. *See* 407 U.S. at 14-15. It also makes sense because the contractually-chosen forum is presumptively the "convenient" forum for resolution of disputes between the parties to the contract. *See Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1293 (7th Cir. 1989); *see also Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1139 (6th Cir. 1991) (recognizing that the expense and inconvenience associated with travelling to another forum are "inherent in a forum selection clause").

The Fifth Circuit, however, held the burden of proof does not shift based on a forum-selection clause.[6] (Pet. 9a-10a). The court wrote: "we cannot

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[6] The Fifth Circuit's decision has been read by district courts as placing the burden of proof on the party seeking to enforce the contract. *See Vasquez v. El Paso II Enters., LLC*, 2012 WL 6160986, *2 (W.D. Tex. Dec. 11, 2012) (declining to enforce a

conclude that the district court clearly abused its discretion by placing the burden on the movant." (Pet. 9a). The Fifth Circuit found that "no part of the Supreme Court's decision in *Stewart* necessarily requires the burden to be placed on the non-moving party." (Pet. 9a). Although correct that *Stewart* did not address the burden of proof, this Court's earlier decision in *Bremen* unequivocally placed the burden on a party seeking to avoid its contractually-chosen forum. *See* 407 U.S. at 14-15.

The Fifth Circuit further erred by suggesting that the allocation of the burden of proof in a § 1404(a) analysis is a matter of discretion for the district court. (Pet. 9a-10a). The allocation of the burden of proof is a legal question, and not a matter of discretion. *See, e.g., Whitehouse Hotel Ltd. P'ship v. Comm'r of Internal Revenue,* 615 F.3d 321, 332 (5th Cir. 2010); *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 480 (2d Cir. 2008); *Fuji Kogyo Co. Ltd. v. Pacific Bay Int'l, Inc.*, 461 F.3d 674, 681 (6th Cir. 2006). The Fifth Circuit offers no explanation as to why a district court should have discretion to deviate from the established burden imposed on a party that seeks to avoid its contractually-chosen forum.

The district court's entire opinion denying transfer was based on findings that Atlantic Marine did not meet its burden of proof. (Pet. 40a). Had the burden been allocated correctly, the district court should have reached the opposite conclusion, and ordered transfer of this case to Virginia even under Section 1404(a).

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forum-selection clause in a case involving the denial of benefits under an ERISA Plan).

2. The Fifth Circuit compounded its error by allowing the district court to consider alleged inconveniences in the Section 1404(a) analysis that were foreseeable at the time of contracting. The Fifth Circuit wrote:

> To remove all matters of inconvenience foreseeable when the parties reached their choice of forum agreement from the required weighing by federal district judges cannot be squared with *Stewart*. The argument is simply a slip past its core holding—institutional concerns cannot be contracted away by private parties.

(Pet. 11a). Contrary to the Fifth Circuit's decision, the "core holding" of *Stewart* was that the determination of whether to transfer a case from one federal court to another is governed by federal law, not state law. *See* 487 U.S. at 28-32. As Justice Kennedy explained, institutional concerns favor enforcement of private contractual venue choices. *Id.* at 33 (Kennedy, J., concurring).

There is nothing in *Stewart* that allows a party to avoid a forum-selection clause based on conveniences that were foreseeable at the time of contracting. To the contrary, *Stewart* explained that the Court's *Bremen* decision was "instructive" in resolving the venue issue. *See* 487 U.S. at 28. In *Bremen*, the Court placed a high hurdle in front of parties seeking to avoid their contract based on inconveniences that were foreseeable at the time of contracting. *See* 407 U.S. at 17-18. By allowing J-Crew to avoid its contractual forum-selection clause based on alleged inconveniences that were foreseeable at the time of contracting, the Fifth Circuit acted in conflict with *Bremen* and its sister circuits when considering the

issue in a Section 1404(a) analysis. *See Heller Fin., Inc.*, 883 F.2d at 1293; *Moses*, 929 F.2d at 1139.

D. Review of This Case Is Needed Now

The issues raised in Atlantic Marine's Petition are recurring issues that impact a tremendous number of civil cases. There is an urgent need for this Court to resolve the circuit split regarding the proper procedures to enforce forum-selection clauses. Over the last two years, the circuit courts have become more divided, thereby adding great uncertainty to the meaning and enforceability of forum-selection clauses.

To relagate enforcement of forum-selection clauses to a discretionary convenience analysis under Section 1404(a), is to invite error and erode the right to contract. "Many federal courts, applying this balancing test, have found that a transfer is not warranted." *See* WRIGHT & MILLER § 3803.1 at 77. In the last six months of 2012 alone, numerous district courts (in Texas, Pennsylvania, Ohio, New Jersey, etc.) have written decisions declining to enforce forum-selection clauses as a matter of discretion.[7] So

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[7] *See, e.g., Veverka v. Royal Caribbean Cruises, Ltd.*, 2012 WL 6204911, at *4-7 (D. N.J. Dec. 11, 2012); *Vasquez*, 2012 WL 6160986, at *2; *Myers v. Jani-King of Phila., Inc.*, 2012 WL 6058146, at *4-6 (E.D. Pa. Dec. 5, 2012); *Austin v. Life Partners, Inc.*, 2012 WL 5334649, at *5 (D. Nev. Oct. 26, 2012); *Estate of Thomas v. Cimsa Ingenieria de Sistemas*, 2012 WL 5335277, at *5 (N.D. Ohio Oct. 26, 2012); *Milliken & Co. v. Reynolds*, 2012 WL 5354399, at *4-9 (D.S.C. Oct. 26, 2012); *Star Techs., LLC v. Gilig LLC*, 2012 WL 5194072, at *1-4 (S.D. W.Va. Oct. 19, 2012); *Clark v. Dale Prop. Servs.*, 2012 WL 4442783, at *3-7 (W.D. Pa. Sept. 25, 2012); *Idacorp., Inc. v. Am. Fiber Sys., Inc.*, 2012 WL 4139925, at *4 (D. Idaho Sept. 19, 2012); *Oak St. Printery v. Fujifilm N. Am. Corp.*, 2012 WL 4086776, at *5-6 (M.D. Pa.

long as this issue is treated as a matter of discretion, district courts will be asked to spend significant time and resources analyzing whether the contract clause should control. There are literally thousands of decisions analyzing this issue, with mixed results.[8]

This Court should resolve the split in authority now and "announce and encourage rules that support private parties who negotiate such clauses." *See Stewart*, 487 U.S. at 33 (Kennedy J. concurring). There are very limited options to seek redress from a discretionary decision declining to enforce a forum-selection clause. For those in circuits following the minority rule, the Fifth Circuit's decision illustrates that those limited options, such as mandamus, are no longer available. Unless action is taken to reverse this authority, the enforcement of forum-selection clauses in many states will be both discretionary, and unreviewable on appeal.

CONCLUSION

Atlantic Marine Construction Company respectfully prays that this Court grant this Petition for Writ of Certiorari, reverse the decision of the United States Court of Appeals for the Fifth Circuit, and enter an order directing that this case be dismissed

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Sept. 17, 2012); *Managed Protected Servs., Inc. v. Credo Petroleum Corp.*, 2012 WL 3264515, at *4 (D. Ariz. Aug. 9, 2012). Of course, this sample is not just limited by time, it is also limited due to the fact that only a small fraction of district court decisions are actually reported to public services such as Westlaw.

[8] *See* MARCUS, at 975 n.4 (identifying 168 decisions on Westlaw in 2006 analyzing this issue, and commenting on the fact that many cases on this topic are likely not reported).

or transferred to the United States District Court for the Eastern District of Virginia, Norfolk Division.

Respectfully submitted,

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January 25, 2013

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed November 19, 2012]

No. 12-50826

In re: ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,

Petitioner

Petition for a Writ of Mandamus to the Western District of Texas, Austin

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Before HIGGINBOTHAM, ELROD, and HAYNES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This case turns on the proper procedural treatment of a forum-selection clause. In April 2009, the United States Corps of Engineers contracted with Atlantic Marine Construction ("Atlantic") for construction of a child development center at Fort Hood, located in the Western District of Texas. In connection with that contract, Atlantic entered into a Subcontract Agreement with J-Crew Management, Inc. ("J-Crew") for provision of construction labor and materials. This Subcontract Agreement included a forum-selection clause, providing that disputes "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern Dis-

trict of Virginia, Norfolk Division." It contained no choice of law provision.

Ignoring the forum-selection clause, J-Crew filed suit against Atlantic in the Austin Division of the Western District of Texas,[1] alleging that Atlantic failed to pay J-Crew for work performed under the Subcontract Agreement. Atlantic moved to dismiss J-Crew's suit under Federal Rule of Civil Procedure 12(b)(3) and 28 U.S.C. § 1406, arguing that the forum-selection clause obligated J-Crew to bring suit in Virginia. Alternatively, Atlantic moved to transfer the case to the Eastern District of Virginia under 28 U.S.C. § 1404(a).

The district court denied the motion to dismiss or transfer the case. It first concluded that when a forum-selection clause designates a specific federal forum or allows the parties to select the federal courts of a different forum, section 1404(a), not Rule 12(b)(3) and § 1406, is the proper procedural mechanism for its enforcement. Applying § 1404(a), the district court denied Atlantic's motion to transfer, finding that Atlantic had not met its burden of showing why the interest of justice or the convenience of the parties and their witnesses weighed in favor of transferring the case to Virginia. Atlantic petitions this Court for a writ of mandamus directing the district court to dismiss the case or transfer it to the United States District Court for the Eastern District of Virginia.

I.

Three requirements must be met before a writ of mandamus may issue. First, the petitioner must have

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[1] The district court had diversity jurisdiction. 28 U.S.C. § 1332.

no other adequate means of relief.[2] Second, the petitioner's right to issuance of the writ must be "clear and indisputable."[3] Third, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances."[4]

With respect to the second requirement—that the petitioner's right to issuance of the writ must be "clear and indisputable"—this Court has made clear that "we are not to issue a writ to correct a mere abuse of discretion, even though such might be reversible on a normal appeal."[5] Instead, we will only grant mandamus relief when errors "produce a patently erroneous result" and "clearly exceed[] the bounds of judicial discretion."[6]

Atlantic urges that the district court clearly abused its discretion (1) by considering enforcement of the forum-selection clause under § 1404(a), instead of under Rule 12(b)(3) and § 1406, and (2) by committing errors when conducting its analysis under § 1404(a). Because we find the district court did not clearly abuse its discretion in either respect, we deny Atlantic's petition.

II.

Atlantic first argues that the district court clearly abused its discretion by using § 1404(a), instead of Rule 12(b)(3) and § 1406, to enforce the contractual

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[2] *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 311 (5th Cir. 2008) (en banc).

[3] *Id.* (quoting *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-81 (2004)).

[4] *Id.* (quoting *Cheney*, 542 U.S. at 380-81).

[5] *Id.* at 310.

[6] *Id.*

forum-selection clause. We begin with a brief explanation of the relevant statutory framework. Section 1391 governs whether venue is proper in a given federal district.[7] Rule 12(b)(3) and § 1406(a) provide for dismissal or transfer of an action that has been brought in an improper venue.[8] By contrast, when the action has been brought in a proper venue, section 1404 provides for transfer of the action within the federal system to another federal venue where the action could have been brought.[9] Thus, the determination of whether § 1406 or § 1404(a) applies turns on whether venue is proper in the court in which the suit was originally filed. If venue is improper in that court, then § 1406 or Rule 12(b)(3) applies. If venue is proper in that court, then § 1404(a) applies. In turn, the choice between Rule 12(b)(3) and § 1406 on the one hand and § 1404 on the other depends on whether private parties can, through a forum-selection clause, render venue improper in a court in which venue is otherwise proper under § 1391.[10] Federal circuit courts are divided on the issue.[11]

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[7] *See* 28 U.S.C. § 1391.

[8] Rule 12(b)(3) provides for a motion to dismiss for improper venue. FED. R. CIV. P. 12(b)(3). Section 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406.

[9] Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a).

[10] In this case, venue was proper in the Western District of Texas under § 1391 because the parties entered into and per-

The district court below held that when a forum-selection clause designates a specific federal forum or allows the parties to select the federal courts of a different forum, a motion to transfer under § 1404(a) is the proper procedural mechanism for enforcing the clause. In so doing, the district court followed the approach taken by a majority of district courts in this Circuit[12] and a minority of the federal appellate courts.[13] We agree with that approach.

In reaching the conclusion that enforcement of the forum-selection clause under § 1404(a) was proper, we find the Supreme Court's opinion in *Stewart Organization, Inc. v. Ricoh Corp.* instructive.[14] In that case, the plaintiff filed suit in the Northern District of Alabama and the defendant moved to dismiss the case or transfer venue to the Southern District of New York based on a contractual forum-selection clause. The Supreme Court held that when an action is filed in federal court under diversity jurisdiction, federal law, specifically § 1404(a), not state law, gov-

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formed the Subcontract Agreement in that judicial district. *See* 28 U.S.C. § 1391(b)(2).

[11] *Compare TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472, 477-78 (2d Cir. 2011), *and Slater v. Energy Servs. Grp. Int'l Inc.*, 634 F.3d 1326, 1333 (11th Cir. 2011), *with Kerobo v. Sw. Clean Fuels Corp.*, 285 F.3d 531, 535 (6th Cir. 2002), and *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995).

[12] *See, e.g., Williamson-Dickie Mfg. Co. v. M/V Heinrich J*, 762 F. Supp. 2d 1023, 1028 (S.D. Tex. 2011); *Se. Consulting Grp., Inc. v. Maximus, Inc.*, 387 F. Supp. 2d 681, 684-85 (S.D. Miss. 2005); *Lafargue v. Union Pac. R.R.*, 154 F. Supp. 2d 1001, 1003-04 (S.D. Tex. 2001); *Brock v. Baskin-Robbins USA Co.*, 113 F. Supp. 2d 1078, 1082-82 (E.D. Tex. 2000).

[13] *See Kerobo*, 285 F.3d at 538-39; *Jumara*, 55 F.3d at 879-79.

[14] 487 U.S. 22 (1988).

erns a motion to transfer to another federal court pursuant to a forum-selection clause. In doing so, the Stewart Court "implicitly held that a forum selection clause does not render the venue of an otherwise properly venued claim improper" because "Section 1404(a) is the proper procedural tool for transferring a case only when venue is proper in the chosen district; if venue is improper, Section 1406(a) is used to transfer venue."[15] The *Stewart* Court explained that a forum-selection clause should receive "the consideration for which Congress provided in § 1404(a)."[16] Thus, *Stewart* "strongly implies that Congress' determination of where venue lies cannot be trumped by private contract and that, therefore, a forum selection clause cannot render venue improper in a district if venue is proper in that district under federal law."[17] This result makes sense "because private parties should not have the power to transcend federal venue statutes that have been duly enacted by Congress and render venue improper in a district where it otherwise would be proper under congressional legislation."[18] That Atlantic Marine claims to have exactly this power is understandable. Dismissal under Rule 12(b)(3) or transfer under § 1406 would deny district courts both a role in making the transfer and its capture of Texas law. While Atlantic Marine bargained for a choice of forum, it failed to obtain a choice of law provision.

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[15] 14D CHARLES A. WRIGHT, ET. AL., FEDERAL PRACTICE AND PROCEDURE § 3803.1 (3d ed.).

[16] *Stewart*, 487 U.S. at 31.

[17] WRIGHT, *supra* note 13, at § 3803.1 (3d ed.).

[18] *Id.* However the concurring opinion reads *Stewart*, it is plain that its view would render it a dead letter.

Although Atlantic urges otherwise, our approach is in accord with Fifth Circuit precedent holding that dismissal under Rule 12(b)(3) is the proper approach when a forum-selection clause designates an arbitral, foreign, or state court forum.[19] When a forum-selection clause designates an arbitral, foreign, or state court forum, a district court does not have the option of transferring the case to the designated forum because § 1404(a) and § 1406 only allow for transfer within the federal system. Because dismissal is the only available option for the district court in those cases, dismissal is the proper remedy.[20] By contrast, this Court has implied that dismissal is inappropriate when transfer pursuant to § 1404(a) is available, as is the case when a forum-selection clause designates a federal forum.[21]

Nor is our approach inconsistent with this Court's decision in *Jackson v. West Telemarketing Corp.*

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[19] *See, e.g., Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005) (arbitral forum); *Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33 (5th Cir. 1997) (foreign forum); *Int'l Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112 (5th Cir. 1996) (state court forum).

[20] *See Amplicon*, 77 F.3d at 115.

[21] *Id.* at 113-14 ("Although we would prefer to apply the same *Stewart* balancing in diversity cases to motions to dismiss and motions to transfer, the other federal courts have decided otherwise and continue to apply *Bremen* to motions to dismiss based on a forum selection clause . . . . Still other courts have suggested that a motion to dismiss is not an appropriate means of enforcing a forum selection clause, and that instead the motion should be treated as a motion to transfer. However, these cases, unlike our own, did not involve a forum selection clause that limited the agreed venue to a state court." (internal citations omitted)).

Outbound.[22] *Jackson* does not necessarily rest on a finding that a forum-selection clause renders venue improper in any venue other than that designated—a holding we would not quickly attribute to the panel as it cannot be squared with *Stewart*. Faced with an opaque record, the panel was unable to find footing for concluding more than that venue was improper in the California district court; that conclusion came from the inference that because transfer was under § 1406 and no § 1404 analysis was conducted, venue must have been improper. Why it was improper was of lesser concern and the panel did not say. Because the vitality of venue in California was muddled, we cannot exclude the possibility that venue was improper under § 1391 in the district where originally filed. Reading *Jackson* in conformity with *Stewart* we cannot conclude that *Jackson* determines the outcome in this case.

In short, *Stewart* did not hold that § 1404 is *always* the proper approach when the parties have entered into a contractual forum-selection clause. The choice between § 1404 and § 1406 depends on whether venue was statutorily proper under § 1391 in the forum where the action was initially filed. A forum-selection clause is properly enforced via § 1404(a) as long as venue is statutorily proper in the district where suit was originally filed and as long as the forum-selection clause elects an alternative federal forum. When the forum-selection clause designates an arbitral, foreign, or state court forum, the federal district court is without power to transfer and thus must dismiss the case as long as it determines the forum-selection clause is enforceable.

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[22] 245 F.3d 518 (5th Cir. 2001).

III.

Atlantic next argues that even if the district court correctly chose § 1404(a) as the proper procedural mechanism for enforcing the forum-selection clause, it made several errors in conducting its analysis under § 1404(a) that show a clear abuse of discretion. Specifically, Atlantic alleges that the district court clearly erred (1) by placing the burden of proof under § 1404(a) on Atlantic, the party seeking to enforce the forum-selection clause, to show why transfer to the designated forum should be granted; (2) by considering inconvenience that was foreseeable at the time the parties entered into the Subcontract Agreement; (3) by considering non-existent difficulties in obtaining depositions from non-party witnesses located in Texas; and (4) by not considering the public interests served by enforcement of the forum-selection clause. After reviewing the record and case law with respect to each of these alleged errors, we cannot find that the district court clearly abused its discretion.

A.

First, Atlantic contends that although the movant seeking to transfer under § 1404(a) generally bears the burden of proving the propriety of transfer, when the parties have entered into a contractual forum-selection clause the party seeking to avoid the contractually-chosen forum bears the burden of proving why the contractual choice should not be honored. Given the fact that this Court has never confronted that issue, we cannot conclude that the district court clearly abused its discretion by placing the burden on the movant. Moreover, no part of the Supreme Court's decision in *Stewart* necessarily requires the burden to be placed on the non-moving party. The Supreme Court merely insisted that the forum-

selection clause be "a significant factor that figures centrally in the district court's calculus."[23] Placing the burden on the moving party still allows the court to give the forum-selection clause "the consideration for which Congress has provided in § 1404" because the district court will consider the forum-selection clause in evaluating both the private and public interest factors.[24] Although transfer under § 1404(a) involves consideration of "the convenience of parties and witnesses" and "the interest of justice," that does not mean that in the absence of burden shifting the § 1404(a) approach will disfavor forum-selection clauses or allow litigants to easily circumvent their contractually-chosen forum. Instead, by incorporating the forum-selection clause into the private and public factor analysis, it will be difficult for a party to avoid the contractually-chosen forum. In light of the Supreme Court's language in *Stewart* and the realities of the § 1404(a) analysis, we are not persuaded that the district court clearly mis-allocated the burden under § 1404(a).

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[23] *Stewart*, 487 U.S. at 29.

[24] *Id.* at 31; *see id.* at 29-30 ("A motion to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors. The presence of a forum-selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the district court's calculus. In its resolution of the § 1404(a) motion in this case, for example, the District Court will be called on to address such issues as the convenience of a Manhattan forum given the parties' expressed preference for that venue, and the fairness of transfer in light of the forum-selection clause and the parties' relative bargaining power. The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences.").

B.

Second, Atlantic argues that the district court gave undue consideration to the foreseeable inconvenience J-Crew would face if the case were transferred to the Eastern District of Virginia. Atlantic urges that because J-Crew entered into a valid forum-selection clause it should have been precluded from arguing that the selected forum is inconvenient if such inconvenience was foreseeable at the time of contracting. *Stewart* teaches that Congress has by § 1404(a) removed the lateral transfer of cases among federal courts from the control of private contracts. While a contracted-for choice of forum remains a significant factor, it is not controlling. To remove all matters of inconvenience foreseeable when the parties reached their choice of forum agreement from the required weighing by federal district judges cannot be squared with *Stewart*. The argument is simply a slip past its core holding—institutional concerns cannot be contracted away by private parties. Finally, we add that our consideration of this late-arriving argument as a variation of the arguments made below is generous. Atlantic failed to argue below that the district court should not consider foreseeable inconvenience and Atlantic points to no controlling authority holding foreseeability is a necessary consideration under § 1404(a).[25] Thus, we conclude that the district court did not "clearly and indisputably" err by failing to consider an argument that was not before it and that was not compelled by precedent.

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[25] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the only case Atlantic cites for this proposition, did not employ a § 1404(a) analysis, so even if foreseeability is an appropriate consideration under the *Bremen* factors, it does not necessarily follow that the same is true in a § 1404(a) analysis.

C.

Third, Atlantic argues that the district court clearly erred in considering non-existent difficulties J-Crew would face in obtaining depositions from non-party witnesses in Texas if the case were transferred to Virginia. Atlantic contends that these alleged difficulties are unfounded because under Rule 45(a)(2)(B) the parties would be able to issue subpoenas to compel witnesses to sit for depositions in Texas.[26] Atlantic's argument misses the point. The district court below was mainly concerned with J-Crew's ability to secure witnesses for trial, not for depositions. And the district court's concerns with respect to J-Crew securing trial testimony were well-founded, notwithstanding Rule 45(a)(2)(B). J-Crew identified seven non-party witnesses that may provide relevant testimony who reside in Texas and any trial subpoenas for witnesses to travel more than 100 miles would be subject to motions to quash under Rule 45(c)(3)(ii).[27] Thus, we are unpersuaded by Atlantic's argument that the district court clearly erred by considering J-Crew's ability to secure testimony for trial in Virginia.

D.

Finally, Atlantic argues that the district court clearly erred in not recognizing the strong public interest favoring enforcement of forum-selection clauses. However, Atlantic failed to raise this argument below. In fact, the only argument Atlantic made with respect to the public's interest in transferring the case to Virginia was that courts in the Eastern

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[26] FED. R. CIV. P. 45(a)(2)(B).

[27] Fed. R. Civ. P. 45(c)(3)(ii); *see In re Volkswagen of Am.*, 545 F.3d at 316.

District of Virginia resolve cases faster than those in the Western District of Texas, a factor considered and rejected by the district court below. Regardless, the argument here is essentially that because the forum-selection clause did not dictate a different outcome it must not have been weighed properly. The district court was plainly conversant with *Stewart*. We cannot conclude that the district court "clearly and indisputably erred" by not giving proper weight to the public interest in ways Atlantic did not even raise before the district court.

IV.

The core of *Stewart* is the directive of Congress that allocation of matters among the federal district courts is not wholly controllable by private contract. Rather the agreement of parties will signify in the district court's allocating decision, tempering the private agreement's reflection of private interests with the public interest attentive to the usual metrics of this case law, such as time to trial and convenience of witnesses. The contention that dismissal may be under § 1406 or Rule 12(b)(3) empties *Stewart* of force and confounds the plain language § 1406. Thus, we DENY Atlantic Marine's Petition for a Writ of Mandamus.

HAYNES, Circuit Judge, specially concurring:

In light of the majority opinion, I cannot credibly contend that the right to the writ is "clear and indisputable" as required for mandamus relief. *See In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008) (en banc). Thus, I concur in the majority opinion's holding.

I. The District Court Erred

I submit, however, that the district court erred in its ruling and approach. I also respectfully diverge from the analysis of the majority opinion. Plainly stated, the Supreme Court has made clear that forum-selection clauses are enforceable. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991) (explaining that forum-selection clauses aid in avoiding confusion among parties regarding the proper forum, limiting litigation expenses, and "conserving judicial resources that otherwise would be devoted to deciding [venue disputes]." (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring))). The effect of the district court's ruling, however, is to make forum-selection clauses enforceable by specific performance only at the election of the district court, which is free to render a decision that evades practical review, given our substantial limits on mandamus review, *see In re Volkswagen*, 545 F.3d at 310-11, and the practical unavailability of review on appeal following final judgment. *Id.* at 319 ("[T]he prejudice suffered [from an erroneous transfer decision] cannot be put back in the bottle . . . an appeal will provide no remedy for a patently erroneous failure to transfer venue.").

In *M/S Bremen*, the Supreme Court stated that forum-selection clauses "are prima facie valid," and should generally be enforced "unless [the party challenging enforcement] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* at 10, 15. Under this standard, the parties' forum-selection clause, which requires that disputes be brought in a specific state or federal court in Virginia, is enforceable as J-Crew Management, Inc. ("J-Crew") has neither shown nor made any attempt to show any injustice in proceeding in Virginia. J-Crew simply violated its agreement and filed suit against Atlantic in the Western District of Texas.

The district court denied Atlantic's motion to dismiss because it found venue was proper in the Western District of Texas pursuant to 28 U.S.C. § 1391. The court then stated it would consider the parties' forum-selection clause merely as a factor in denying Atlantic's motion to transfer pursuant to § 1404(a), although it gave very short shrift to the forum-selection clause in the ensuing analysis. The majority opinion correctly concludes that a forum-selection clause may be enforced through a motion to transfer based on § 1404(a). *See, e.g., Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). I disagree, however, with the holding that this vehicle for relief is the exclusive means of enforcing a forum-selection clause that contemplates a federal forum when the original federal forum is valid under a permissive venue statute.

II. The Majority Opinion's Analysis is Incorrect

A. Forum-Selection Clauses Do Not "Transcend" Permissive Venue Statutes

The majority opinion reasons that a motion to dismiss or transfer pursuant to § 1406 cannot be granted when a forum-selection clause contemplates another federal forum and the plaintiff's chosen forum is statutorily permissive because doing so would allow private parties to transcend federal venue statutes. However, the statute in question here is permissive, not mandatory.[1] *See* 28 U.S.C. § 1391. Significantly, § 1391 is a general and permissive venue statute that provides "a civil action *may* be brought in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." *See* 28 U.S.C. § 1391(b)(2) (emphasis added). Unlike other statutes that mandate venue in

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[1] Although the statute that purportedly establishes venue in this case is permissive, it is significant to note that this circuit has found that forum-selection clauses may trump even seemingly mandatory venue statutes. For example, Congress provided that any action under the Miller Act, 40 U.S.C. §§ 3131-3134, "*must* be brought . . . in the United States District Court for any district in which the contract was performed and executed . . . ." 40 U.S.C. § 3133 (emphasis added). This circuit has held that this provision in the Miller Act "is not jurisdictional but only a venue provision . . . [which] may be varied by contract unless under the circumstances the agreement is unreasonable." *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 95 (5th Cir. 1979) (citations omitted) (denying a petition for writ of mandamus seeking reversal of a district court's decision to transfer an action to a venue contemplated by a forum-selection clause pursuant to a motion to transfer based on § 1404(a)). The court explained that the seemingly mandatory venue provision "exists for the convenience of the parties. Such a provision is subject to variation by their agreement . . . ." *Id.*

a particular forum, § 1391 does not mandate that venue be laid in a particular district. Accordingly, in the absence of congressional direction otherwise, the parties remain free to consider all permissive venues and to "var[y] by their agreement," 588 F.2d at 95, the number of venues through a forum-selection clause. In so doing, the parties do not transcend federal law, but instead agree that neither will seek to maintain venue in certain otherwise permissive forums.[2]

Here, because J-Crew and Atlantic contracted to limit the scope of permissive federal forums to the Eastern District of Virginia, the Western District of Texas becomes a "wrong venue." The district court should have given effect to the parties' valid forum-selection clause and either dismissed the action for improper venue under 12(b)(3) or transferred it pursuant to § 1406. The parties did not seek to transcend the applicable federal venue statute; instead, each merely agreed that it would not bring suit in any other permissive federal forum apart from the Eastern District of Virginia, a permissive venue. This agreement does not replace or contradict § 1391, but instead only limits the parties' prerogative to avail themselves of the full scope of permissive venues that the statute would otherwise provide.

B. *Stewart* Does Not Require a Contrary Result

The majority opinion's reliance on *Stewart* to support the proposition that federal venue law must

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[2] The Eastern District of Virginia is also a permissive venue under § 1391(a)(1) & (a)(2) because all of the Defendants reside there and it is the place where a substantial part of the alleged events or omissions giving rise to J-Crew's claims occurred.

trump forum-selection clauses that contemplate a federal forum is misplaced. Similar to the forum-selection clause at issue here, *Stewart* involved a forum-selection clause that allowed for suit only in specific state or federal courts. 487 U.S. at 24. *Stewart*'s narrow holding determined that federal law, rather than state law, applies to a party's motion to transfer in a diversity action filed in federal court. *See id.* (describing the question presented as "whether a federal court sitting in diversity should apply state or federal law in *adjudicating a motion to transfer* a case to a venue provided in a contractual forum-selection clause." (emphasis added)). The Court specifically noted that the defendant's motion to dismiss based on § 1406 was not at issue on appeal because the claim of "improper venue" had been waived by the defendant. *See id.* at 28 n.8.

We have recognized the limited scope of *Stewart*, explaining that the case holds "that § 1404(a) is an appropriate vehicle for such a transfer because it allows for an individualized assessment of fairness and convenience, with a forum selection clause being one factor for consideration. *Stewart* does not mandate that whenever a forum selection clause exists any transfer must fall under § 1404(a)." *Jackson v. W. Telemarketing Corp. Outbound*, 245 F.3d 518, 522 (5th Cir. 2001) (emphasis removed). Although limited to the question of whether federal or state law applies in federal venue disputes, *Stewart* itself illustrates that an agreement between private parties can render inappropriate an otherwise appropriate federal forum. On remand from the Supreme Court in that very case, the Eleventh Circuit issued a writ of mandamus ordering the case transferred to the venue specified in the parties' forum-selection clause. *In re Ricoh Corp.*, 870 F.2d 570, 571 (11th Cir. 1989). In

enforcing the forum-selection clause, the court noted that the case did not present the "'exceptional' situation in which judicial enforcement of a contractual choice of forum clause would be improper." *Id.* at 574 (citing *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring)). Thus, the actual result of *Stewart* is exactly the opposite of the result reached here.

The Supreme Court has not read *Stewart* the same way as the majority opinion. Indeed, following *Stewart*, the Court in *Shute* embraced *M/S Bremen*'s holding and enforced a forum-selection clause by affirming the grant of a motion for summary judgment. *See* 499 U.S. at 591-94. The Court's approval of the use of a summary judgment motion as a vehicle for enforcing the forum-selection clause—which implicitly contemplated a federal forum by allowing for suit in any court in "the State of Florida"—demonstrates that *Stewart* does not render forum-selection clauses enforceable only under the discretion of a district court performing a § 1404(a) analysis. *See id.* at 588-89. Instead, as *Shute* demonstrates, these clauses may also be given effect when a party alleges venue is not proper under a motion to dismiss or a motion for summary judgment. Accordingly, I respectfully submit that the majority opinion takes *Stewart* too far.

C. The Majority Opinion Is Contrary to the Majority of Circuit Courts and Inconsistent with Our Precedent

My view is consonant with that of the majority of circuits which give effect to a forum-selection clause through a motion to dismiss filed pursuant to Rule 12(b)(3) and § 1406. *See, e.g.*, *Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968, 970-73 (8th Cir. 2012) (rejecting the notion that a claim cannot be

dismissed under § 1406 for failure to comply with a forum-selection clause if venue is otherwise appropriate under 28 U.S.C. § 1391); *TradeComet LLC.com v. Google, Inc.*, 647 F.3d 472, 478 (2d Cir. 2011) (noting that *Stewart* does not compel consideration of a forum-selection clause under § 1404(a) and holding that "a defendant may seek to enforce a forum selection clause under Rule 12(b)"); *Slater v. Energy Servs. Gr. Int'l, Inc.*, 634 F.3d 1326, 1333 (11th Cir. 2011) ("[W]e conclude that § 1404(a) is the proper avenue of relief where a party seeks the transfer of a case to enforce a forum-selection clause, while Rule 12(b)(3) is the proper avenue for a party's request for dismissal based on a forum-selection clause."); *Hillis v. Heineman*, 626 F.3d 1014, 1016 (9th Cir. 2010) (finding that a party's defense for improper venue under Rule 12(b)(3) based on a forum-selection clause was valid and was not waived by the filing of a counterclaim); *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 760-62 (7th Cir. 2006) ("A challenge to venue based upon a forum selection clause can appropriately be brought as a motion to dismiss the complaint under [Rule] 12(b)(3)."); *Sucampo Pharm., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 548-50 (4th Cir. 2006) (holding that a forum-selection clause may be enforced "under Rule 12(b)(3) as a motion to dismiss on the basis of improper venue"); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 954 (10th Cir. 1992) (affirming a district court's dismissal of claims based on a forum-selection clause that contemplated a foreign jurisdiction).[3]

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[3] In contrast to these cases, the Third and Sixth Circuits embrace the majority opinion's approach in this case by concluding that, when venue is otherwise proper in the original forum, § 1404(a) is the only appropriate procedural vehicle to enforce a

Our circuit has not addressed whether a forum-selection clause contemplating a federal forum may be enforced through a motion to dismiss for improper venue. However, as the majority opinion points out, we have found that a Rule 12(b)(3) motion to dismiss for improper venue is an appropriate vehicle for enforcing a forum-selection clause that contemplates state, foreign or arbitral forums. *See Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005) (arbitral forum); *Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33, 37 (5th Cir. 1997) (foreign forum); *Int'l Software Sys., Inc. v. Amplicon, Inc.* 77 F.3d 112, 115 (5th Cir. 1996) (state forum).

Further, we suggested in *Jackson* that a forum-selection clause contemplating a federal forum could be enforced through a motion to transfer for improper venue based on § 1406. *See* 245 F.3d at 522. The choice-of-law analysis in *Jackson* required us to consider whether a federal district court in California transferred a case to a federal district court in Texas based on § 1404(a) or § 1406. We concluded that the

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forum-selection clause that contemplates an alternative federal forum. *See, e.g., Kerobo v. Sw. Clean Fuels Corp.*, 285 F.3d 531, 538-39 (6th Cir. 2002); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995) ("Since venue is proper in the [district] where the action commenced, . . . [t]he District Court should instead have applied the appropriate balancing test under 28 U.S.C. § 1404(a) to determine whether the case should proceed in the [district] or be transferred to the [district where the forum-selection clause contemplates the action should lie]."). More recently, however, the Sixth Circuit suggested that a forum-selection clause contemplating both federal and state forums may be enforced through a motion to dismiss. *See Langley v. Prudential Mortg. Cap. Co.*, 546 F.3d 365, 366 (6th Cir. 2008) (remanding to the district court "to entertain a motion to enforce the forum selection clause under [Rule] 12(b)(6) or 28 U.S.C. § 1404(a)").

California court ordered transfer under § 1406 based on a forum-selection clause. *Id.* at 522-23. We specifically noted that "*Stewart* does not mandate that whenever a forum selection clause exists any transfer must fall under § 1404(a)." *Id.* at 522. The majority opinion disregards *Jackson*'s guidance.

D. The Forum-Selection Clause at Issue Should be Given Effect

The effect of the majority opinion is to leave us with the somewhat bizarre situation that forum-selection clauses are enforceable by specific performance where the forum is state, foreign, or arbitral, but enforceable by specific performance only at the mercy of the district court for federal courts. I submit that we should adopt the approach of the majority of our sister circuits and use § 1406 transfers in these situations. Absent a mandatory venue statute, a valid forum-selection clause renders any other forum inappropriate, regardless of whether the forum contemplated by the parties is a state, federal, or foreign venue.

Congress, is of course, free to limit the enforcement of forum-selection clauses if it so chooses, as it has done in the past. For example, after the Supreme Court in *Shute* gave effect to a forum-selection clause in a cruise line's passage contract ticket, Congress initially amended 46 U.S.C. § 30509 to prevent passenger ships from seeking enforcement of forum-selection clauses when plaintiffs raise personal-injury or wrongful-death claims. *See Reynolds-Naughton v. Norwegian Cruise Line Ltd.*, 386 F.3d 1, 2 (1st Cir. 2004) (explaining that § 30509 was initially amended to supercede *Shute*'s holding). Interestingly, however, Congress ultimately re-amended the statute to allow for the enforcement of forum-selection clauses in the

context of passage contract tickets. *See id.* at 2-3 (discussing the subsequent amendments to § 30509). Congress continues to look favorably on forum-selection clauses, as reflected in the recent amendment to § 1404(a) allowing for the transfer of cases to venues chosen by agreement that would otherwise not be districts where an action "might have been brought." *See* § 1404(a).[4]

A forum-selection clause that was negotiated and agreed to by sophisticated parties and is not challenged based on fraud, unreasonableness, or anything similar should be given effect. As Atlantic notes, the negotiation of a forum-selection clause involves various economic decisions and often requires a party to make concessions in exchange for

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[4] Specifically, this amendment provides that a transfer can be made to "any district or division to which all parties have consented," regardless of whether the venue would otherwise be proper. *See* § 1404(a); *see also* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 204, 125 Stat. 758, 764; 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §111.12(1)(c) (3d ed. Supp. 2012) (explaining that the amendment superceded the requirement in *Hoffman v. Blaski*, 363 U.S. 335 (1960), that a transferring court could only transfer to a venue with personal jurisdiction and "could not consider the defendant's consent to the transferee venue"). Accordingly, parties may seek transfer under §1404(a) to a venue where the action could have otherwise been brought or that was consented to by the parties through a forum-selection clause. *See* § 1404(a). This amendment does not supercede the majority of federal circuits that allow for forum-selection clauses also to be enforced through Rule 12(b)(3) motions or motions to transfer based on § 1406. Rather, by explicitly providing that § 1404(a) allows for transfer to a venue that would otherwise be invalid but for the parties consent, this amendment demonstrates that Congress recognizes that forum-selection clauses may be enforced even where the chosen venue is not that chosen by federal venue statutes.

the assurance that potential litigation will occur in a predetermined venue. Companies, such as Atlantic, that conduct business throughout a broad geographical area rely on forum-selection clauses to ensure that they can anticipate business costs and avoid litigation in a plethora of possible venues. Section 1406 seems to be the cleanest way to do so, treating the venue now "deselected" by the agreement as a "wrong" venue. This approach does not transcend federal venue statutes, but instead recognizes the ability of parties to "var[y] by their agreement," 588 F.2d at 95, the breadth of the scope of permissive venue statutes through their contractual agreements.

I note, however, that even if the majority opinion is correct that § 1404 is the only appropriate procedural vehicle here, the district court still abused its discretion. While stating that it considered the forum-selection clause as a "factor," the district court in practical terms gave it no weight and conducted a standard § 1404 "convenience" analysis. I can discern no practical difference between this district court opinion and that of a district court that was assessing this same case without a forum-selection clause. Whatever the procedure may be, the substance was wrong.

Absent any claim of fraud or unreasonableness by J-Crew, mere "convenience" should not trump the parties' reasoned contract. Had the district court given the forum-selection clause the deference it deserves, it would have transferred the case under either §1404 or §1406.

E. Conclusion

We should not leave the enforcement by specific performance of otherwise valid contractual forum

selection clauses to the vicissitudes of virtually unfettered judicial discretion. Absent some compelling countervailing factor (something J-Crew does not even argue is present here), forum-selection clauses such as this one should be and should have been enforced by transfer or dismissal.[5] Thus, while the very high standards for mandamus review coupled with the majority opinion's approach compel my concurrence in the judgment, I conclude that the district court erred.

Given the state of the law in this area, I encourage the parties to request review of today's decision by the United States Supreme Court, so it may consider whether this area of the law would benefit from its further guidance.

---

[5] That said, nothing in the majority opinion would preclude Atlantic's seeking of some other remedy for the clear breach. As Atlantic discussed during oral argument, J-Crew's disregard for the parties' bargained-for agreement by bringing suit in Texas may result in Atlantic incurring substantial litigation costs that it would have otherwise avoided. On remand, it is free to seek damages for those costs.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRCT OF TEXAS AUSTIN DIVISION

[Filed August 6, 2012]

Cause No. A-12-CV-228-LY

UNITED STATES OF AMERICA, FOR THE USE OF J-CREW MANAGEMENT, INC.,
Plaintiffs,

v.

ATLANTIC MARINE CONSTRUCTION COMPANY, INC., BRUCE W. EXUM, JR., AND LINDA M. EXUM,
Defendants.

ORDER

Before the court in the above-styled cause of action are Defendants' Motion to Dismiss Plaintiff's First Amend Complaint or, Alternatively, Transfer Venue, filed May 23, 2012 (Clerk's Doc. No. 20), Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss Amended Complaint or to Transfer Venue, filed June 6, 2012 (Clerk's Doc. No. 21), and Defendants' Reply Brief in Support of Motion to Dismiss Plaintiff's First Amended Complaint or, Alternatively, Transfer Venue, filed June 13, 2012 (Clerk's Doc. No. 22). Having considered the motion, response, reply, the case file, and relevant law, the court will grant in part and deny in part Defendants' motion.

I. Background

This suit arises from a construction project known as the Ft. Hood Child Development Center No. 1, located at Ft. Hood, in Killeen, Texas. The project is owned by the United States Government, U.S. Army Corps of Engineers. Pursuant to an agreement entered into on or about April 16, 2009, the government contracted with Defendant Atlantic Marine Construction Co., Inc. (Atlantic), a Virginia corporation with its principal place of business in Virginia Beach, Virginia, for the design and construction of the project. Atlantic entered into a subcontract agreement on July 29, 2010, with Plaintiff J-Crew Management, Inc. (J-Crew), to perform certain work required of Atlantic under the prime contract.

J-Crew alleges that it fully performed all of its obligations under the subcontract, and Atlantic failed to pay J-Crew for the labor and materials it furnished Atlantic. J-Crew pleads claims of breach of contract, *quantum meruit*, and unjust enrichment against Atlantic, as well as violations of the Texas Construction Trust Fund Statute & Accounting Act and Texas Prompt Pay Act against Atlantic, Bruce W. Exum, Jr., and Linda M. Exum, President and Vice President of Atlantic, respectively.

Atlantic[1] moves to dismiss J-Crew's Texas statutory claims under Rule 12(b)(6) on the basis that the construction project at issue occurred on federal land no longer part of the state of Texas. *See* FED. R. CIV. P. 12(b)(6). Atlantic also moves the court to dismiss this action on the basis of a forum-selection clause in the subcontract agreement, mandating a Virginia

---

[1] Because Defendants' interests do not diverge, they will be referred to collectively as "Atlantic."

forum under Rule 12(b)(3) and section 1406 of Title 28 of the United States Code. *See* FED. R. CIV. P. 12(b)(3); 28 U.S.C. § 1406(a). Alternatively, Atlantic requests that the court transfer this suit to the United States District Court for the Eastern District of Virginia, Norfolk Division under section 1404 of Title 28. *See* 28 U.S.C. § 1404(a).

II. Analysis

The subcontract agreement between J-Crew and Atlantic contains a forum-selection clause that states in pertinent part:

> [J-Crew] agrees that all . . . disputes . . . shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division. The Parties hereto expressly consent to the jurisdiction and venue of said courts.

Atlantic argues that this clause evidences the parties' contractual choice of a Virginia forum for the resolution of their disputes, and that this court should either dismiss this cause or transfer it to the Eastern District of Virginia. J-Crew argues that the forum-selection clause is no longer a valid part of the Subcontract Agreement because J-Crew exercised its statutory right under section 272.001 of the Texas Business and Commerce Code to void the forum-selection clause when it filed this complaint in Texas federal court. The court first considers whether the forum-selection clause remains a valid part of the parties' contract before turning to the question of whether dismissal or transfer on the basis of such clause is appropriate.

A. Validity and Enforceability of Forum-Selection Clause

Section 272.001 applies "only to a contract that is principally for the construction or repair of an improvement to real property located in this state." TEX. BUS. & COMM. CODE § 272.001(a). If the section applies, a forum-selection clause making any conflict arising under the contract subject to litigation in the courts of another state is "voidable by the party obligated by the contract to perform the construction or repair." *Id.* § 272.001(b). Atlantic argues that this provision from the Texas Business and Commerce Code does not apply to the construction project at issue in this case because the project is located entirely on land ceded to the federal government by Texas.

"Under the Constitution the United States has the power to acquire land from the states for certain specified uses and to exercise exclusive jurisdiction over such lands, which are known as federal enclaves." *Lord v. Local Union No. 2088, Intl Bhd. of Elec. Workers, AFL-CIO*, 646 F.2d 1057, 1059 (5th Cir. 1981) (citing U.S. CONST. art. I, § 8, cl. 17). "The jurisdiction exercised by the United States over federal enclaves is exclusive unless the deed of cession provides to the contrary or unless the cession is not accepted in the manner required by law." *Id.* Texas ceded exclusive jurisdiction over the land comprising Fort Hood to the United States on September 6, 1950. *Adams v. Calvert*, 396 S.W.2d 948, 949 (Tex. 1965). The Department of the Army accepted exclusive jurisdiction over the land, and Texas reserved concurrent jurisdiction over the land only for the purpose of executing civil and criminal process. *Id.*

Although J-Crew concedes for purposes of this motion that Fort Hood is a federal enclave, it argues that Fort Hood is still "located within" Texas for purposes of the Texas Business and Commerce Code's provision concerning construction projects in the state. In support of this argument, J-Crew directs the court to a Texas case in which the court held that inventory shipped from a warehouse in Texas to an Army Depot on a federal enclave geographically contained within Texas was not transported "outside this State" for purposes of a statutory tax exemption. *See Aviall Servs., Inc. v. Tarrant Appraisal Dist.*, 300 S.W.3d 441, 446-47 (Tex. App.—Fort Worth 2009, no pet.).

This court agrees with Atlantic that J-Crew's reliance on *Aviall* is misplaced. In *Aviall*, the court reasoned that the phrase "outside this State" in the tax-exemption provision did not implicate the state's power to exercise jurisdiction or legislation over the property or residents of the federal enclave, because the state was not attempting to assess taxes on property within the enclave. *Id.* at 446. Rather, the state sought to assess the tax solely on inventory located on Aviall's private property—a distribution center in Irving, Texas—located outside the enclave. *Id.*

Similarly, the Sixth Circuit Court of Appeals reasoned that a military reservation was a "geographical part of the city, county and state of which it was at the time of acquisition by the United States" in the context of a state statute requiring a banking corporation to apply to the state commissioner of banking for permission to establish a new branch "within the city in which its principal office is located." *First Hardin Nat'l Bank v. Fort Knox Nat'l Bank*, 361 F.2d 276, 278-79 (6th Cir. 1966). The banking corporation

in that case sought to establish a branch bank at Radcliff, Hardin County, Kentucky—a location outside of the federal enclave at issue. *Id.* at 278. The court held that it was a question of fact for the state comptroller to determine whether the principal office of Fort Knox National Bank, located within the federal enclave, remained geographically part of Hardin County for purposes of the state banking act. *Id.* at 279.

In contrast, section 272.001 of the Texas Business & Commerce Code, if applied to the construction contract in this case, would amount to Texas exercising legislative jurisdiction over property located entirely within the federal enclave. "It is well established that in order for Congress to subject a federal enclave to state jurisdiction, there must be a specific congressional deferral to state authority over federal property." *W. River. Elec. Ass 'n, Inc. v. Black Hills Power & Light Co.*, 918 F.2d 713, 719 (8th Cir. 1990); *see also Evans v. Cornman*, 398 U.S. 419, 424 (1970) (statute in question permitted state unemployment-compensation law to be applied to services performed on "land or premises owned, held, or possessed by the United States"); *Howard v. Comm'rs of Sinking Fund of City of Louisville*, 344 U.S. 624, 627-28 (1953) (statute in question specifically permitted state income tax on persons residing or working in "Federal area"). In the absence of any legislative authorization of concurrent state and federal jurisdiction over property within the federal enclave of Fort Hood, this court holds that section 272.001 of the Texas Business & Commerce Code does not apply to the subcontract agreement between J-Crew and Atlantic concerning a construction project contained entirely within the federal enclave. Accordingly, J-Crew did not void the forum-selection clause

contained in the subcontract agreement by filing suit in a Texas forum.

B. Dismissal or Transfer

Having concluded that the forum-selection clause remains a valid part of the parties' contract, the next question is whether and how the forum-selection clause should be enforced. Atlantic seeks an order either dismissing or transferring this case pursuant to Rule 12(b)(3) and section 1406(a) on the basis of improper venue, or transferring the case for convenience pursuant to section 1404(a). Rule 12(b)(3) and section 1406(a) are the procedural vehicles for dismissing or transferring an action that has been brought in an improper forum. *See* FED. R. CIV. P 12(b)(3); 28 U.S.C. 1406(a); *Lim v. Offshore Speciality Fabricators, Inc.*, 404 F.3d 898, 902 (5th Cir. 2005). In contrast, where an action has been brought in a forum that is "proper" within the meaning of the federal venue statutes, section 1404(a) serves as the vehicle for transferring the action to a more convenient forum. *See* 28 U.S.C. §1404(a); *see also* 28 U.S.C. § 1391 (governing venue of all civil actions brought in federal district courts).

Federal courts are split on the question of whether a mandatory forum-selection clause renders an otherwise proper venue improper for purposes of section 1406(a), and the Fifth Circuit Court of Appeals has not yet decided this question. *Compare Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 535 (6th Cir. 2002) ("whether a forum-selection clause should be enforced is a matter of contract, not an issue of proper venue") with *Salton, Inc. v. Philips Domestic & Pers. Care B.V.*, 391 F.3d 871, 881 (7th Cir. 2004) ("a forum-selection clause is a substitute for the legal rules governing venue"). However, a survey of the case law

from this circuit illustrates that the type of forum designated in the forum-selection clause is determinative of whether dismissal or transfer is the proper means of giving effect to the parties' contractual choice of venue.

When a forum-selection clause designates a state-court forum, an arbitral forum, or a forum in a foreign country, the proper remedy is dismissal. *See Lim*, 404 F.3d at 902 (arbitral forum); *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33, 37 (5th Cir. 1997) (foreign forum); *Intl Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112, 113-15 (5th Cir. 1996) (state-court forum). In such cases, the Fifth Circuit has applied the Supreme Court's rule as stated in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), to determine the enforceability of a forum-selection clause. *See Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 441 (5th Cir. 2008). *Bremen* held that federal courts sitting in admiralty generally should enforce forum-selection clauses, absent a showing that to do so "would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Bremen*, 407 U.S. at 15.

By contrast, where a forum-selection clause designates a specific federal forum or allows the parties to select the state or federal courts of a different forum, the majority of district courts in this circuit have held that a motion to transfer under section 1404(a) is the proper approach. *See, e.g., Williamson-Dickie Mfg. Co. v. M/V Heinrich J*, 762 F. Supp. 2d 1023, 1028 (S.D. Tex. 2011) (surveying district-court case law); *Se. Consulting Grp., Inc. v. Maximus, Inc.*, 387 F. Supp. 2d 681, 683-84 (S.D. Miss. 2005) (same). This result finds support in the Supreme Court's

decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988).

In *Stewart*, as here, the defendant moved either for dismissal for improper venue under section 1406(a) or transfer under section 1404(a) on the basis of a forum-selection clause. 487 U.S. at 28. The Court held that section 1404(a), as opposed to state law, governed the district court's decision whether to give effect to the parties' forum-selection clause. *Id.* at 32. Implicit in this holding is the finding that venue was proper in the transferor court, despite the fact it was not the forum selected by the parties in their forum-selection clause, as section 1404(a) only concerns transfers of cases originally filed in a "proper venue." *See Tel-Phonic Servs., Inc. v. TBS Intl, Inc.*, 975 F .2d 1134, 1141 (5th Cir. 1992). Moreover, the *Stewart* Court noted that the parties agreed that the district court properly denied the motion to dismiss for improper venue under section 1406(a) on the basis that the defendant did business in the plaintiff's chosen venue. 487 U.S. at 28 n.8 (citing 28 U.S.C. § 1391(c) (venue proper in judicial district in which corporation is doing business)).

District courts in this circuit have reasoned that "where jurisdiction is based upon diversity, the forum-selection clause allows suit in another federal court, and venue is proper under 28 U.S.C. § 1391 in the court in which the plaintiff filed suit, the Supreme Court's decision in *Stewart* directs the Court to apply the standard set forth in 28 U.S.C. § 1404(a) taking appropriate consideration of the parties' apparent choice of forum." *E.g.*, *Brock v. Baskin-Robbins USA Co.*, 113 F. Supp. 2d 1078, 1085 (E.D. Tex. 2000). In such cases, the *Bremen* case's presumption of enforcement of a forum-selection clause

"may prove instructive in resolving the parties' dispute," but the clause is insufficient to justify transfer on its own. *Stewart Org., Inc.*, 487 U.S. at 28 (forum-selection clause should receive "neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a)").

In this diversity action, venue is proper in this court because the subcontract that is the subject of this lawsuit was entered into and was to be performed in this judicial district. *See* 28 U.S.C. § 1391(b)(2) (venue proper in judicial district in which substantial part of events or omissions giving rise to claim occurred, or substantial part of property that is subject of action is situated). In light of the fact that the forum-selection clause in this case allows the parties to file suit in a state or federal forum, this court joins the majority of district courts in this circuit in holding that section 1404(a) controls Atlantic's request to give effect to the parties' contractual choice of a Virginia forum.

C. Section 1404(a) Transfer

"[F]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it may have been brought." 28 U.S.C. § 1404(a). The decision to effect transfer under section 1404(a) is committed to the discretion of the district court. *Jarvis Christian Coll. v. Exxon Corp.*, 845 F.2d 523, 528 (5th Cir. 1988). In addition to the factors set forth in the statutory text, courts consider a nonexhaustive and nonexclusive list of public and private interest

factors, none of which are of dispositive weight.[2] *See In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) (*Volkswagen I*). The parties' forum-selection clause is only one such factor. *Stewart Org., Inc.*, 487 U.S. at 28. Atlantic, as movant, bears the burden of establishing the propriety of transfer. *Williamson-Dickie Mfg. Co.*, 762 F. Supp. 2d at 1029.

1. Private-Interest Factors

A balancing of the private-interest factors relevant to this case militates against a transfer to Virginia. With respect to the first private-interest factor, this court is not persuaded that the sources of proof will be more readily accessible in a Virginia forum. This breach-of-contract action concerns the alleged failure of Atlantic to pay for the work of J-Crew under the parties' subcontract agreement. Atlantic argues that key evidence in this case will be Atlantic's accounting records, invoices, and bank statements, as well as records with respect to its evaluation and selection of subcontract proposals, all of which are located in the Eastern District of Virginia. The location of Atlantic's books and records is a factor for this court's consideration in its section 1404(a) analysis. *See In re Horseshoe Entm't*, 337 F .3d 429, 434 (5th Cir. 2003). How-

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[2] The private interest factors are: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." *Volkswagen I*, 371 F.3d at 203. The public interest factors are: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law." *Id.*

ever, this court concludes that the inconvenience of transporting such records to this forum is minimal compared to the significant problems that would result from the transfer of this case.

The second and third private-interest factors concern the availability of compulsory process to secure the attendance of witnesses and the cost of attendance for willing witnesses. Both of these factors weigh heavily against transfer. The party moving for transfer, here Atlantic, must "specifically identify the key witnesses and outline their testimony" in order to carry their burden with respect to transfer. *Mid-Continent Cas. Co. v. Petroleum Solutions, Inc.*, 629 F. Supp. 2d 759, 763 n.3 (S.D. Tex. 2009). Atlantic has not identified any witness specifically or explained the testimony they would provide that is relevant to this dispute. Rather, Atlantic generally states that Atlantic's company headquarters is in the Eastern District of Virginia and that Atlantic's project-management team, as well as Defendants Bruce and Linda Exum reside there. This is insufficient to carry Atlantic's burden.

First, Atlantic concedes that the members of its project-management team that work on the construction site do not reside in Virginia. It is fair to assume that these employees have more familiarity with the performance of J-Crew under the subcontract than those performing more administrative management of the project from afar. Moreover, even if Atlantic's only witnesses will be members of its project-management team residing in Virginia, these employees are agents of Atlantic, a defendant in this action. It is the relative convenience to nonparty witnesses, not the parties themselves, that is most significant in a court's consideration of a motion to

transfer. *See id.* at 762 ("The relative convenience to the witnesses is often recognized as the most important factor under § 1404(a)."); *Frederick v. Advanced Fin. Solutions, Inc.*, 558 F. Supp. 2d 699, 704 (E.D. Tex. 2009) ("The availability and convenience of party-witnesses is generally insignificant because a transfer based on this factor would only shift the inconvenience from movant to nonmovant . . . . When nearly all of the nonparty witnesses that will testify concerning disputed issues reside elsewhere, this factor weighs in favor of transferring the case.") (internal citation omitted).

Additionally, J-Crew anticipates that Atlantic's primary defense to its suit will be that the work performed by J-Crew was somehow deficient. The evidence relevant to this fact question will be the Child Development Center itself and testimony by those who worked on or oversaw the project. J-Crew states that it intends to call numerous second-tier contractors and tradesmen as witnesses regarding the quality, timing, installation, and construction of the work under the subcontract agreement. J-Crew identifies seven companies it employed in completing the work, from painters to flooring specialists and woodworkers. All of these companies and their employees reside in Texas, and the majority would be within this court's subpoena power. *See* FED. R. CIV. P. 45(c)(3). However, were this court to transfer this case to Virginia, that court's subpoena power with respect to all of these witnesses for purposes of deposition or trial would be subject to motions to quash. *See id.*; *In re Volkswagen of America, Inc.*, 545 F.3d 304, 316 (5th Cir. 2008) ("*Volkswagen II*).

Finally, when the distance between an existing venue and the proposed venue exceeds 100 miles, as

it does here, *Volkswagen II*'s 100-mile rule applies. *See Volkswagen II*, 545 F.3d at 317. According to the 100-mile rule, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled. *Id.* The inconvenience and expense of traveling from Texas to Virginia for J-Crew's willing witnesses would be significant. In light of Atlantic's failure to identify any nonparty witnesses that would be inconvenienced by this court retaining jurisdiction over this case and the demonstrated inconvenience to J-Crew's witnesses, this factor weighs heavily in favor of transfer.

In summary, the court identifies only two private-interest factors in favor of transfer: the parties' forum-selection clause and the fact that Atlantic's books and records are located in Virginia. Weighing against transfer are the fact that compulsory process will not be available for the majority of J-Crew's witnesses, as well as the significant expense for those willing witnesses. The parties' forum-selection clause is not entitled to dispositive weight. *Stewart Org., Inc.*, 487 U.S. at 28. And the court reiterates that the inconvenience of transporting Atlantic's records to this forum is minimal compared to the identified obstacles to securing witnesses for trial that would result from the transfer of this case to Virginia.

2. Public-Interest Factors

Atlantic makes only one argument with respect to the public's interest in transferring this case to Virginia: that the Eastern District of Virginia is a more efficient forum to resolve this dispute. Atlantic cites to the court statistics that the Eastern District of Virginia disposes of civil cases, on average, 2.3 months faster than this court. The court finds this difference to be negligible.

Moreover, the other public-interest factors weigh in favor of denying transfer. A transferee district court under section 1404(a) is obligated to apply the state law that would have applied had there been no change of venue. *See Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (1404(a) change of venue is "but a change of courtrooms"). Texas law governs the parties' contractual dispute in this diversity case. *See Holt v. State Farm Fire & Cas. Co.*, 627 F.3d 188, 191 (5th Cir. 2010); *see also Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (where jurisdiction is based on diversity, this court applies substantive law of forum state, here Texas). This court presumes that it is much more familiar with Texas contract law than federal courts in Virginia. Finally, despite the fact that the construction project at issue in this case is located in a federal enclave, the project is of far greater significance to the people of this district than residents of Virginia.

In summary, weighing the private- and public-interest factors and considering the arguments presented by the parties regarding transfer, the court finds that Atlantic has not carried its burden to demonstrate that a transfer of this case to Virginia would be in the interest of justice or increase the convenience to the parties and their witnesses. Accordingly, the court will deny the motion to transfer under section 1404(a).

D. Motion to Dismiss Under Rule 12(b)(6)

Having determined that this case will remain in the Western District of Texas, the court's final consideration is whether Atlantic is entitled to a dismissal of J-Crew' s Texas statutory claims under Rule 12(b)(6). J-Crew alleges that Atlantic violated the Texas Construction Trust Fund Act and the Texas

Prompt Pay Act in failing to compensate J-Crew for the work it performed under the parties' subcontract agreement. *See* TEX. PROP. CODE § 162.001(a); TEX. GOV'T CODE § 2251.022. The Texas Construction Trust Fund Act creates a cause of action for misapplication of "trust funds," which are defined as "construction payments . . . made to a contractor . . . under a construction contract for the improvement of specific real property in this state." TEX. PROP. CODE § 162.001(a) (emphasis added). The Texas Prompt Pay Act states that "[a] vendor who receives a payment *from a governmental entity* shall pay a subcontractor the appropriate share of the payment not later than the 10th day after the date the vendor receives the payment." TEX. GOV. CODE § 2251.022(a) (emphasis added). Atlantic argues that J-Crew has failed to plead a cause of action under either Texas statute, because the construction project is located in a federal enclave, not in the state of Texas, and the owner of the project at issue is the United States Government, not a Texas governmental entity.

Rule 12(b)(6) allows for dismissal of an action "for failure to state a claim upon which relief can be granted." Although a complaint attacked by a Rule 12(b)(6) motion does not need detailed factual allegations, in order to avoid dismissal, the plaintiffs factual allegations "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007). A plaintiff's obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* The Supreme Court expounded on the *Twombly* standard, explaining that a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face.

Ashcroft v. Iqbal, --- U.S. ---, 129 S. Ct. 1937, 1949 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In evaluating a motion to dismiss, the court must construe the complaint liberally and accept all of the plaintiff's factual allegations in the complaint as true. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2009).

For the same reasons this court concludes that J-Crew does not have a statutory right under Texas law to void the forum-selection clause by filing suit in this court, the court also finds that J-Crew's claim under the Texas Construction Trust Fund Act fails as a matter of law. The construction project at issue in this case is located in a federal enclave, though geographically situated within the state of Texas, outside of its legislative jurisdiction. Accordingly, the parties' subcontract agreement was not a construction contract for the "improvement of specific real property in this state," and Texas lacks legislative jurisdiction over the U.S. Government's construction contracts that were performed on land located entirely within a federal enclave. *See W. River. Elec. Ass'n, Inc.*, 918 F.2d at 719 ("It is well established that in order for Congress to subject a federal enclave to state jurisdiction, there must be a specific congressional deferral to state authority over federal property.").

With respect to the Texas Prompt Pay Act claim, this court also agrees with Atlantic that the United States Government, U.S. Army Corps of Engineers, rather than a Texas governmental entity, is responsible for payment to the Government's "vendor"—

Atlantic—under the prime construction contract. *See* TEX. GOV. CODE § 2251.022. Accordingly, Atlantic was not subject to the Prompt Pay Act's time limitations on its payments to its subcontractor, J-Crew.

Therefore, the court will grant Atlantic's motion to dismiss these two claims. Because these are the only claims J-Crew pleads against Defendants Bruce W. Exum, Jr., and Linda M. Exum, the court's dismissal of these claims leaves Atlantic as the only remaining defendant in this suit.

III. Conclusion

Having considered Atlantic's motion, the response and reply, as well as the case file and the applicable law to this cause, the court holds that J-Crew did not void the forum-selection clause by filing suit in this court. However, this court will deny Atlantic's motion to dismiss for improper venue because this court is of the opinion that section 1404(a), not section 1406(a) and Rule 12(b)(3), is the proper mechanism for enforcement of the parties' contractual choice of forum. Under the analysis dictated by section 1404(a), this court will deny the motion to transfer and retain jurisdiction over this case. Finally, the court will dismiss J-Crew's Texas statutory claims for failure to state a claim on the basis that neither the Texas Construction Trust Fund Act nor Texas Prompt Pay Act govern Atlantic's alleged misconduct in this case. J-Crew may proceed with its common-law claims of breach of contract, *quantum meruit*, and unjust enrichment against Atlantic.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Plaintiff's First Amend Complaint or, Alternatively, Transfer Venue (Clerk's Doc. No. 20) is GRANTED IN PART. J-Crew's Texas

statutory claims under the Texas Construction Trust Fund Act and Texas Prompt Pay Act are hereby DISMISSED. In all other respects the motion is DENIED.

SIGNED this 6th day of August, 2012.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES DISTTRICT JUDGE

OPPOSITION BRIEF

No. 12-929

Supreme Court, U.S.
FILED
FEB 25 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

J-CREW MANAGEMENT, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition for *Certiorari*, where the Fifth Circuit Court of Appeals unanimously held that Atlantic Marine Construction Company, Inc. failed to satisfy the standard for a Petition for a Writ of Mandamus directing this case be transferred to the Eastern District of Virginia?

2. Whether private parties can render a venue that is proper pursuant to 28 U.S.C. § 1391, "improper" and divest federal judges of the discretion Congress entrusted to them and mandated they exercise?

CORPORATE DISCLOSURE STATEMENT

Respondent, J-Crew Management, Inc., pursuant to Supreme Court Rule 29.6, states the following:

J-Crew is a privately-owned corporation. It has no parent company and no corporation owns 10% or more of Respondent's shares.

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INTRODUCTION

District courts are not bound by the whim of private parties in determining the manner in which they adjudicate disputes; rather, they are bound by Congress, pursuant to 28 U.S.C. § 1404(a), and by this Court's precedent to consider additional factors so that the interests of justice are served. The Court in *Stewart* was clear: "[w]e hold that federal law, specifically 28 U.S.C. § 1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause and transfer this case to [the district designated in the parties' contract]." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988).

Atlantic Marine Construction Company, Inc. ("Atlantic") failed to meet its burden in the trial court of showing that transferring this case to the Eastern District of Virginia would advance the interests protected by § 1404(a). It failed again in the Fifth Circuit to show that its right to a writ of mandamus directing the case to be transferred was "clear and indisputable." While the disagreement among the Circuit Courts identified in the Petition may warrant this Court's consideration under more appropriate circumstances, it serves only to demonstrate why a writ of mandamus was not appropriate in this case. Consequently, Atlantic's Petition for Writ of *Certiorari* should be denied.

STATEMENT OF THE CASE

This case presents the precise circumstances confronted by the Court in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988)—a diversity case filed in a venue that is proper pursuant to 28 U.S.C. § 1391, but contrary to a forum-selection clause designating an alternative federal district as the location to resolve any disputes.

Factual Background:

This case arises from J-Crew's delivery of labor and materials to a construction project located at Fort Hood, Texas, pursuant to a subcontract entered into between Atlantic and Respondent, J-Crew Management, Inc. ("J-Crew"). Atlantic asserts offsets against payments due to J-Crew for untimely or nonconforming work performed on the project. Although not mentioned in Atlantic's Petition, Fort Hood is located in the Western District of Texas, as are the subcontractors, suppliers and tradesmen who performed the work at issue. These second-tier subcontractors are expected to testify in this matter regarding the timing and quality of the labor and materials delivered to Atlantic and may themselves become necessary parties to this litigation. Pet. 12a; 38a. None of these non-party witnesses would be subject to process in the Eastern District of Virginia, and none are under the control of J-Crew.

Tellingly, Petitioner could not specifically identify a single witness located in the Eastern District of Virginia and conceded that its own witnesses with relevant knowledge of this dispute are themselves located in the Western District of Texas. Pet. 37a.

Proceedings in the District Court:

Petitioner filed a motion to dismiss J-Crew's complaint based on the forum-selection clause pursuant to 28 U.S.C. § 1406 and Fed. R. Civ. P. 12(b)(3).[1] The District

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1. Atlantic's Motion to Dismiss, as it related to the forum-selection clause, was premised only upon 28 U.S.C. § 1406 and Fed.

Court denied Petitioner's motion, concluding that that enforcement of the forum-selection clause should be determined pursuant to § 1404(a). The court found support for its decision to deny Atlantic's motion to dismiss in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988) ("[w]e hold that federal law, specifically 28 U.S.C. § 1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause and transfer this case to [the district designated in the parties' contract].").

The court then considered and denied Atlantic's alternative motion to transfer venue pursuant to § 1404(a). A review of the district judge's order reveals that the court's decision was the result of a reasoned and balanced analysis, giving appropriate consideration to Atlantic's forum-selection clause, in accordance with 28 U.S.C. § 1404(a) and this Court's precedent. Pet. 35a-40a; *Stewart*, 487 U.S. 22, 31 (1988) ("[t]he forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a).").

Specifically, the district court considered the parties' forum-selection clause, the location of Atlantic's books and records, as well as Atlantic's argument that the Eastern District of Virginia disposes of cases, on average, 2.3 months faster than the courts of the Western District of

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R. Civ. P. 12(b)(3)—not Rule 12(b)(6). Consequently, the separate question as to whether a party may move for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) based upon a forum-selection clause could not properly be before the Court on the merits.

Texas. The court then balanced these factors against the expense and inconvenience to at least seven non-party witnesses, applying the "100-mile rule" set forth by the Fifth Circuit in *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 317 (5th Cir. 2008), *cert. denied, Singleton v. Volkswagen of America,* 129 S.Ct. 1336 (2009), the problems with securing compulsory process over key witnesses to attend trial, as well as efficiency in conducting discovery, familiarity with the Texas law, and the importance of the litigation to the people of the Western District of Texas. [2]

Weighing these competing factors, the district court concluded that the matter should not be transferred to Virginia.

Proceedings in the Court of Appeals:

Atlantic filed a Petition for Writ of Mandamus, compelling the district court to dismiss or transfer the case to the Eastern District of Virginia. The Fifth Circuit unanimously held that the district court did not "clearly abuse its discretion" and denied Atlantic's petition.

The Fifth Circuit relied upon *Stewart's* explicit holding that "federal law, ***specifically § 1404(a),*** not state law, governs a motion to transfer to another federal court

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2. Texas has expressed a strong interest in having local construction disputes decided in Texas. Tex. Bus & Com. Code § 272.001, which applies to contracts for the improvement of real property located in the State of Texas, provides: "[i]f a contract contains a provision making the contract or any conflict arising under the contract subject to another state's law, litigation in the courts of another state, or arbitration in another state, that provision is voidable by the party obligated by the contract to perform the construction or repair."

pursuant to a forum-selection clause." Pet. 5a-6a (emphasis added). The court also adopted the well-recognized implicit corollary "that a forum-selection clause does not render the venue of an otherwise properly venued claim 'improper' because Section 1404(a) is the proper procedural tool for transferring a case only when venue is proper in the chosen district; if venue is improper, Section 1406(a) is used to transfer venue." Pet. 6a. Judge Higginbotham writing for the Majority further reasoned that "private parties should not have the power to transcend federal venue statutes that have been duly enacted by Congress and render venue improper in a district where it otherwise would be proper under congressional legislation." *Id.*

Circuit Judge Haynes filed a special concurrence in which she not only joined in the Majority's holding that Atlantic failed to meet its heavy burden for a writ of mandamus, but also agreed with the Majority that forum-selection clauses may be enforced under § 1404(a). Pet. 15a ("[t]he majority opinion correctly concludes that a forum-selection clause may be enforced through a motion to transfer based on § 1404(a)."). Judge Haynes, however, disagreed that § 1404(a) "is the *exclusive* means of enforcing a forum-selection clause that contemplates a federal forum when the original federal forum is valid under a permissive venue statute." Pet. 15a (emphasis added).

Significantly, Judge Haynes did not explain how venue could be both proper (and therefore within the scope of § 1404) and "improper" or "wrong" (and therefore within the scope of § 1406 and Rule 12(b)(3)) at the same time based on the same facts. The determination of whether venue is proper cannot depend upon the method of enforcement.

Atlantic now seeks this Court's review of the Fifth Circuit's decision, without any mention of the mandamus standard it failed to meet, or any assertion that the Fifth Circuit abused its discretion in denying the Writ of Mandamus. Petitioner merely states that the court erred by holding that enforcement of the forum-selection clause was subject to § 1404(a), following the Third, Sixth, and Seventh Circuits. Consequently, the Petition for *Certiorari* should be denied.

REASONS FOR DENYING THE PETITION

The Petition should be denied because disagreement among the circuit courts does not provide Atlantic a basis to circumvent the requirements for mandamus relief that it failed to satisfy before the Fifth Circuit; moreover, the primary question Atlantic presents for review avoids the central issue and cannot resolve the underlying disagreement among the circuits. Even if the transfer question warranted review in the abstract, this case would not be an appropriate vehicle for resolving the split in authority among the Circuit Courts of Appeal.

Most importantly, however, the Fifth Circuit's decision is compelled by this Court's holding in *Stewart* and by the demands of Congress. District courts are not bound by the decisions of private parties in determining the manner in which they adjudicate disputes; rather, they are bound by Congress and this Court's precedent to weigh competing factors and to ensure that the interests of justice are served.

A. This Case Would Be a Poor Vehicle for Deciding the Questions Posed by Petitioner:

1. Petitioner Cannot Side-Step the High Hurdle to a Writ of Mandamus:

This Court has admonished that a writ of mandamus is an extraordinary remedy, to be granted only in extreme cases where a petitioner's "right to issuance of the writ is clear and indisputable." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-81 (2004). Atlantic failed to overcome this high hurdle to obtaining a writ of mandamus, as the Fifth Circuit held neither the district court's denial of Atlantic's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406 nor its denial of Atlantic's Motion to Transfer Venue pursuant to 28 U.S.C. § 1404(a) was in error—let alone the "clear and indisputable" error required to justify a writ of mandamus.

Indeed, Circuit Judge Haynes, while diverging from the Fifth Circuit Majority's analysis, adhered faithfully to this Court's standards for mandamus relief, recognizing that Atlantic failed to meet its burden and joining in the Majority's core holding. Pet. 14a ("I cannot credibly contend that the right to the writ is 'clear and indisputable' as required for mandamus relief.").

Atlantic now comes before this Court seeking *certiorari* to the Fifth Circuit Court of Appeals—not because the court disregarded well-established precedent, but rather because Petitioner claims the law is unsettled. While the disagreement among the Circuit Courts may warrant this Court's consideration under more appropriate circumstances, it serves only to demonstrate why a writ of

mandamus was not appropriate in this case. If there is any question as to the propriety of the trial court's decision, then there is no question at all: the petition for a writ of mandamus must be—and properly was—denied.

"[I]t is established that the extraordinary writs cannot be used as substitutes for appeals . . . even though hardship may result from delay and perhaps unnecessary trial." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 380-8 (1953). The limited use of mandamus review to correct clearly erroneous denials of motions to transfer has become generally accepted since this pronouncement;[3] however, Atlantic now seeks to eliminate the boundaries of extraordinary appellate review, asking this Court to review the Fifth Circuit's unanimous denial of Atlantic's petition—not to correct an obvious miscarriage of justice, but to "provide clarity." The appellate process cannot be so easily manipulated and abused.

Equally significant, the issuance of a writ of mandamus is a matter vested in the discretion of the court to which

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3. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309 (5th Cir. 2008) (citing *In re Sealed Case*, 141 F.3d 337, 340 (D.C. Cir. 1998); *In re Josephson*, 218 F.2d 174, 183 (1st Cir. 1954), *abrogated on other grounds by In re Union Leader Corp.*, 292 F.2d 381, 383 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961); *In re Warrick*, 70 F.3d 736, 740 (2d Cir. 1995); *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378 (3d Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003); *In re Ralston Purina Co.*, 726 F.2d 1002, 1005 (4th Cir. 1984); *Lemon v. Druffel*, 253 F.2d 680, 685 (6th Cir.), *cert. denied*, 358 U.S. 821 (1958); *In re National Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003); *Toro Co. v. Alsop*, 565 F.2d 998, 1000 (8th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978); *Kasey v. Molybdenum Corp.*, 408 F.2d 16, 19-20 (9th Cir. 1969); *Cessna Aircraft Co. v. Brown*, 348 F.2d 689, 692 (10th Cir. 1965); *In re Ricoh Corp.*, 870 F.2d 570, 573 n. 5 (11th Cir. 1989)).

the petition is made—in this case, the Fifth Circuit Court of Appeals. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 391 (2004). Indeed, even if the district court had erred—which it did not—mandamus still would only have been appropriate if the result was "patently erroneous." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 312 (5th Cir. 2008)("[the Court will] review only for *clear* abuses of discretion ***that produce patently erroneous results.***")(emphasis added). Retaining venue in the Western District of Texas, where all the relevant party witnesses are located, where more than seven non-party witnesses are located, where the physical evidence is located, where the forum state has expressed a strong interest in deciding disputes arising from construction projects locally, where Atlantic's own witnesses are located, and where the burden on the trial court would be minimized—in short, where the interests of justice are best served—is not a "patently erroneous result."

If the Court were to grant Atlantic's Petition, it would allow Petitioner to slide under the high hurdle that must be met for mandamus relief and clear a new path for litigants to seek this Court's interlocutory review of ordinary trial court rulings. J-Crew submits that the benefit of providing clarity to the circuit courts regarding enforcement of a limited set of forum-selection clauses pales in comparison to the damage that would be inflicted upon the standard for mandamus relief if the Court were to grant *certiorari*. The Court should not permit Petitioner to circumvent these high standards by entertaining Atlantic's Petition.[4]

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4. This Court has repeatedly denied *certiorari* in similar contexts: See, e.g., *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 317 (5th Cir. 2008), *cert. denied, Singleton v. Volkswagen of America*, 129 S.C. 1336 (2009); *In re Horseshoe Entertainment*, 337 F.3d 429,

2. The Primary Question Posed by Petitioner Cannot Provide the Clarity Petitioner Seeks:

Atlantic asks the Court to clarify whether *Stewart* "change[d] the standard for enforcement of clauses that designate an alternative federal forum, limiting review of such clauses to a discretionary, balancing-of-conveniences analysis under 28 U.S.C. § 1404(a)." No court—let alone the Fifth Circuit in this case—has held that enforcement of forum-selection clauses is confined to such narrow review, nor has J-Crew ever advocated for such a standard.

Atlantic's primary question is premised upon the faulty assumption that this Court decided the proper mechanism to enforce forum-selection clauses designating an alternative federal forum prior to the Court's seminal decision in *Stewart*. It did not. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) articulated a presumption of validity for forum selection clauses; it did not address the designation of federal forums at all, let alone the limits imposed by Congress to ensure the interests of justice are served by the federal courts. Indeed, the majority in *Stewart* expressly rejected applying the *Bremen* standards to the § 1404(a) analysis. *Stewart*, 487 U.S. 22,

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431-35 (5th Cir. 2003) (granting mandamus to compel a transfer of venue and "recogniz[ing] the availability of mandamus as a limited means to test the district court's discretion in issuing transfer orders."), *cert. denied*, 540 U.S. 1049 (2003); *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378 (3d Cir. 2002) (holding that "we, like other courts, have held that mandamus is the appropriate mechanism for reviewing an allegedly improper transfer order."), *cert. denied*, 537 U.S. 1148 (2003); see also *Matter of Skupniewitz*, 73 F.3d 702 (7th Cir. 1996), *cert. denied*, 517 U.S. 1124 (1996); *Toro Co. v. Alsop*, 565 F.2d 998, 1000 (8th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978).

28-29 ("we disagree with the court's articulation of the relevant inquiry as 'whether the forum selection clause in this case is unenforceable under the standards set forth in The *Bremen*.'").

Moreover, the Fifth Circuit did not hold that § 1404(a) is the *only* means of enforcing a forum-selection clause that designates an alternative federal forum. Rather, the Fifth Circuit, along with the Third, Sixth, and Seventh Circuits, held that when a case is filed in a venue that is proper pursuant to § 1391, *and* the forum-selection clause provides for an alternative federal venue, that § 1404(a), and not § 1406 or Rule 12(b)(3), governs how to give effect to the clause. There is no dispute that dismissal may be appropriate when a case is filed in a venue that is not proper pursuant to § 1391—regardless of whether the forum-selection clause designates an alternate federal venue. The critical inquiry is whether the case was initially filed in a proper venue.

More importantly, Petitioner's primary question avoids the fundamental point of contention among the circuits: whether private parties can render an otherwise proper venue "improper" by agreement. The Fifth Circuit framed the issue as follows:

> The choice between Rule 12(b)(3) and § 1406 on the one hand and § 1404 on the other depends on whether private parties can, through a forum-selection clause, render venue improper in a court in which venue is otherwise proper under § 1391.

Pet. 4a. The Fifth Circuit, along with the Third, Sixth, and Seventh Circuits, has held that private parties cannot

render otherwise proper venue "improper" through a forum-selection clause. *In re Atl. Marine Const. Co., Inc.*, 701 F.3d 736 (5th Cir. 2012); *In re LimitNone, LLC*, 551 F.3d 572, 575-76 (7th Cir. 2008) ("Because the Northern District of Illinois was not an improper venue, § 1404(a), rather than § 1406(a), provided the authority for the transfer order.");[5] *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 830 (6th Cir. 2009); *Kerobo v. Sw. Clean Fuels Corp.*, 285 F.3d 531, 535 (6th Cir. 2002); and *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995). This result necessarily follows from *Stewart*, as § 1404 could not have governed enforcement of the venue issue before the district court if the forum-selection clause rendered venue "improper" where the case was filed.

Equally important, this case does not permit the Court to resolve the lingering question as to whether dismissal based upon a forum-selection clause pursuant to Rule 12(b)(6) would be appropriate. Atlantic's Motion to Dismiss, as it related to the forum-selection clause, was premised only

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5. Petitioner and at least one commentator mistakenly rely upon *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759 (7th Cir. 2006) as holding that § 1406 is the proper means of enforcing a forum-selection clause designating an alternate federal forum. *Muzumdar*, however, did not involve the application of § 1404 or § 1406; rather, the defendants moved to dismiss pursuant to Rule 12(b)(3). The Plaintiffs did not oppose the Motion to Dismiss on the basis that venue was proper pursuant to § 1391; rather, they insisted that the clause was unenforceable since it was a contract of adhesion—an argument properly rejected by the Seventh Circuit as being contrary to *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). Two years later, the Seventh Circuit directly addressed the issue before the Court and held that when venue is proper pursuant to § 1391, § 1404 applies. *In re LimitNone, LLC*, 551 F.3d 572, 575-76 (7th Cir. 2008).

upon 28 U.S.C. § 1406 and Fed. R. Civ. P. 12(b)(3), not Rule 12(b)(6); nor did Petitioner raise the separate, but related, issues identified by the Second Circuit in *TradeComet* that would remain the subject of dispute regardless of the outcome of this case. *TradeComet LLC.com v. Google, Inc.*, 647 F.3d 472 (2d Cir. 2011)("[c]onsequently, we do not address the related, but separate, question whether a district court may, *sua sponte*, convert a Rule 12(b) motion to dismiss into a § 1404(a) motion to transfer. We also do not address circumstances in which a defendant moves in the alternative for both dismissal under Rule 12(b) and transfer under §§ 1404 or 1406(a)."). These issues lie at the heart of the underlying dispute among the circuit courts.

Neither the district court nor the Fifth Circuit Court of Appeals directly addressed these issues below as they were not raised by Petitioner.[6] Consequently, even if the Court granted *certiorari*, reversed *Stewart*, and held that enforcement of forum-selection clauses was not limited to § 1404(a), the result still would not provide any meaningful guidance for lower courts or serve to resolve the fundamental dispute. The Petition should therefore be denied.

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6. While J-Crew submits that a party cannot escape the limits imposed by Congress on forum-selection clauses—that such clauses be for the convenience of the parties, and witnesses, and for the interests of justice—by filing a motion to dismiss instead of a motion to transfer venue, the fact remains that the issue has not been properly presented and cannot be raised for the first time on this appeal.

B. The Fifth Circuit was Correct:

The Petition for *Certiorari* should be denied for a second, and more simple reason: the Fifth Circuit was correct in ruling that private parties cannot render venue improper in a district where it otherwise would be proper under congressional legislation. Pet. 6a. Indeed, as Justice Scalia observed in *Stewart*, "while the parties may decide who between them should bear any inconvenience, only a court can decide how much weight should be given under § 1404(a) to the factor of the parties' convenience as against other relevant factors such as the convenience of witnesses." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 35 (1988) (Scalia, J., dissenting on other grounds).

1. Private Parties Cannot Render Otherwise Proper Venue Improper:

Venue is either proper or it is not—it cannot be both. Congress has made clear that private parties cannot render venue improper within the federal system. *Red Bull Associates v. Best W. Intern., Inc.*, 862 F.2d 963, 967 (2d Cir. 1988) ("[t]he other component of the analysis—the interest of justice—is not properly within the power of private individuals to control. The existence of a forum selection clause cannot preclude the district court's inquiry into the public policy ramifications of transfer decisions."); *but c.f., TradeComet LLC.com v. Google, Inc.*, 647 F.3d 472 (2d Cir. 2011).

The relevant statutory framework is not disputed: § 1391 governs whether venue is proper in a given federal district. Rule 12(b)(3) and § 1406(a) provide for dismissal or transfer of an action that has been brought in an

improper venue. By contrast, § 1404 provides for transfer of the action within the federal system to another federal venue when the action has been initially brought in a proper venue. Pet. 4a.

If Petitoner were correct that a forum-selection clause renders venue "improper," then the foundation of *Stewart*—that 28 U.S.C. § 1404 was a valid congressional act specifically addressing enforcement of the forum-selection clause at issue—crumbles since § 1404 could not have been applicable. *Stewart*, 487 U.S. at 28, 32 ("[a]pplying the above analysis to this case persuades us that federal law, specifically 28 U.S.C. § 1404(a), governs the parties' venue dispute.").

While parties are free to negotiate contracts and allocate any inconvenience of litigation amongst themselves, they cannot divest the district courts of discretion allocated by Congress and handcuff the judiciary in the administration of justice. It is well-settled that a district court may *sua sponte* transfer a case to a more appropriate forum in the interests of justice. See, *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1336 (11th Cir.2011) ("[a] district court may *sua sponte* transfer a civil action to any other district where it might have been brought if doing so will be convenient for the parties and witnesses and serve the interest of justice.").

The court's authority to transfer a case *sua sponte* is derived from § 1404(a) and § 1406 which both provide that district courts may transfer a matter "to any other district or division *where it might have been brought.*" 28 U.S.C. § 1404(a); 28 U.S.C. § 1406. If a forum-selection clause renders every other district "improper" despite

§ 1391, then the district court will be rendered impotent to transfer a case in the interest of justice. Private parties simply do not command such power over the court.

2. The Legislative History of § 1404(a) Confirms the Fifth Circuit's Decision:

Congress has directed that multiple considerations govern transfer within the federal court system and place discretion in the district courts to make this determination on an individualized case-by-case basis. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 35 (1988). This has been the law since *Stewart*, and the Federal Court Jurisdiction and Venue Clarification Act of 2011 reaffirms this view. Atlantic may be disappointed in the balance Congress struck, but the arguable benefits of a bright-line rule do not provide a basis to ignore Congress's authority.

The House Report to the Federal Venue Act reaffirms that Congress expects district courts to make a case-by-case determination, and that the parties' expressed preference is but one consideration. Notably, Congress stated that "under the proposed amendment, such transfers would only be possible where all parties agreed *and only if the court found it to be for the convenience of the parties and witnesses and in the interest of justice.*" H.R. Rep. No. 10, H.R. REP. 112-10, 24, 2011 U.S.C.C.A.N. 576, 580 (emphasis added). Thus, while Atlantic mocks the Fifth Circuit for subjecting enforcement of the forum-selection clause to considerations of "discretionary rules" including "convenience," that is precisely the standard Congress mandates that district courts employ. Notably, the Act also modified 28 U.S.C. § 1391, the general venue statute, yet Congress did not enact any provision that

would make venue exclusive to the forum set forth in a contract between private parties.

One can hypothesize as to why Congress has not blessed forum-selection clauses with the certainty it has brought to arbitration agreements, but it is clear that is not its intent.[7] The fact remains that district courts still retain an interest in determining the most efficient and just location within the federal system to hear the cases they decide, unlike when parties select arbitration.

Judge Haynes correctly noted in her concurrence that the Venue Clarification Act is an expression of congressional intent to encourage forum-selection clauses. Pet. 23a. While it is true that Congress sought to enable parties to choose the venue in which to litigate, Congress still subjected this choice to judicial review to ensure whatever venue the parties selected was for the convenience of the parties and witnesses and in the interests of justice.

Atlantic asserts that concerns for certainty in commerce and contract preclude the Fifth Circuit's decision. But in making its claims, Atlantic fails to recognize that Congress and the federal judiciary must balance private economic concerns with a multitude of

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7. Congress could have adopted a rule favoring enforcement of forum-selection clauses as it has with arbitration provisions. 9 U.S.C. § 2 ("A written provision in any [contract] evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). It chose not to do so, instead opting for a flexible approach.

other factors in the administration of justice. The Fifth Circuit recognized the proper role of § 1404 and denied Atlantic's petition.

C. The Burden of Proof Issue Does Not Warrant this Court's Review:

This Court repeatedly has recognized "[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application, . . . [o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 626 (1993) (citing *Lavine v. Milne*, 424 U.S. 577, 585 (1976)).

The apparent split in authority identified by Petitioner regarding allocation of the burden of proof, and specifically the burden of persuasion, in a § 1404(a) analysis is illusory and not deserving of this Court's review. More importantly, the private and public interest factors weigh so decidedly in favor of venue in the Western District of Texas that J-Crew easily could overcome any burden it had to bear. Consequently, any decision by this Court, regardless of who bears the burden of persuasion, will not affect the result of where this matter is venued.

1. The Circuit Courts are in Agreement regarding the Burden of Proof:

Petitioner correctly states that the Eleventh and Third Circuits shift the burden of persuasion in a § 1404(a) analysis to the party seeking to avoid transfer. Conversely, the Fifth Circuit and the Ninth Circuit state that that the burden remains on the movant to demonstrate that transfer is warranted pursuant to § 1404(a), despite the existence of a valid forum-selection clause. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 499 (9th Cir. 2000), *cert. denied, GNC Franchising, Inc. v. Jones*, 531 U.S. 928 (2000). Each of these circuits, however, still recognize that the "significant" weight to be accorded to forum-selection clauses would require transfer pursuant to § 1404(a) in the absence of countervailing private and public interest factors.

Critically, the reason that the Eleventh Circuit "shifted" the burden of persuasion to the party opposing enforcement of the forum-selection clause was that the presence of a valid clause eliminates the traditional deference accorded to a plaintiff's choice of forum. *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989). Neither the Ninth Circuit, the Fifth Circuit, nor the district court in this case attributed *any* deference to J-Crew's choice of forum. Instead, the district court accorded the forum-selection clause "significant" weight as directed by *Stewart* and still found the clause to be outweighed by the other private and public factors it was compelled to consider. Pet. 39a. While the more appropriate articulation of the standard to be applied is that the movant continues to bear the burden to demonstrate transfer is warranted, the reality is that the circuits all are applying the same standard.

2. The District Court Properly Placed the Burden of Proof on Atlantic to Demonstrate Why Transfer was Warranted:

The district court properly held Atlantic, as movant, bore the burden of establishing the propriety of transfer pursuant to 28 U.S.C. § 1404(a). Pet.9a-10a. The Court in *Stewart* did not leave the weight to be accorded to a forum-selection clause "to a future day" as Petitioner implies; the Court expressly advised:

> The forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a).

Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 31 (1988).[8]

As the Fifth Circuit explained, "[p]lacing the burden on the moving party still allows the court to give the forum-selection clause 'the consideration for which Congress has provided in § 1404' because the district court will consider the forum-selection clause in evaluating both the private and public interest factors." Pet 10a.

While the presence of the forum-selection clause may be a "significant factor," as many courts have

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8. Moreover, as the Court explained, "[t]he flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-30 (1988).

observed, Atlantic offers no basis for shifting the burden of persuasion beyond the *Bremen* standards that were considered and rejected by this Court in the context of a § 1404(a) analysis. As Congress reaffirmed in the legislative history to the Federal Court Jurisdiction and Venue Clarification Act of 2011, "transfers [are] only [ ] possible where all parties agreed ***and*** *only if the court found it to be for the convenience of the parties and witnesses and in the interest of justice.*" H.R. Rep. No. 10, H.R. REP. 112-10, 24, 2011 U.S.C.C.A.N. 576, 580 (emphasis added). Thus, the movant still bears the burden to satisfy the court not only that the parties agreed, but also that transfer be for the *convenience of the parties* ***and*** *witnesses* ***and*** *in the interest of justice.*

3. The Western District of Texas Prevails Regardless of which Party Bears the Burden of Proof:

The Court should decline Petitioner's invitation to "provide guidance on the role of a forum-selection clause in the 1404(a) analysis" for an even more simple reason: the balancing of the private and public interest factors weighs so decidedly in favor of retaining venue of this matter in the Western District of Texas that the burden of persuasion will not affect the result in this case.

Atlantic misconstrues the graveman of the district court's analysis, concluding that the decision was based upon placing the burden on Atlantic. Pet. 23. It was not. A fair reading of the district court's opinion leaves the clear understanding that the district court concluded that the private and public interest factors overwhelmingly pointed

to the Western District of Texas as the appropriate venue for this dispute.

Nevertheless, Petitioner summarily concludes that "had the burden been allocated correctly, the district court should have reached the opposite conclusion and ordered transfer of this case to Virginia under Section 1404(a)." Pet. 23. Petitioner tellingly omits, however, any discussions of the relevant factors that would compel a different result had the "burden" shifted to J-Crew. Again, the district court found, after giving due consideration to the forum-selection clause, that both the private and public interest factors weighed in favor of retaining venue of this matter in the Western District of Texas. J-Crew submits that one would need to attribute "dispositive weight" to Atlantic's forum-selection clause—a standard expressly rejected by this Court—before transfer to the Eastern District of Virginia could be justified.

D. Petitioner Overstates the Urgency of this Matter:

Petitioner overstates the urgency for this Court to resolve the circuit split regarding the proper procedure for enforcing forum-selection clauses that designate an alternate federal forum, and ignores the corresponding damage that would be inflicted upon the standard for mandamus review if the Court were to grant the Petition.

While Atlantic details the well-developed disagreement among circuits, it fails to articulate why the Fifth Circuit's decision creates an urgent need for review beyond the split in authority itself. Circuit Courts have subjected forum-selection clauses providing for an alternate federal venue to the required § 1404(a) analysis ever since this

Court's holding in *Stewart*. See, *Red Bull Associates v. Best W. Intern., Inc.*, 862 F.2d 963, 967 (2d Cir. 1988); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873 (3d Cir. 1995). Still, businesses engaged in interstate commerce have managed to flourish over the past 25 years despite the split in authority and the "discretionary" § 1404(a) limits imposed upon their right to contract for a designated federal venue. The Sixth and Seventh Circuits similarly have followed this approach. *In re LimitNone, LLC*, 551 F.3d 572, 575-76 (7th Cir. 2008); *Kerobo v. Sw. Clean Fuels Corp.*, 285 F.3d 531, 535 (6th Cir. 2002). The mere fact the Fifth Circuit recently followed suit does not create an urgent need for review.

Similarly, district courts in every district of the Fifth Circuit have been analyzing forum-selection clauses providing for venue in another federal district court in accordance with *Stewart* and § 1404(a) for years.[9] The

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9. *See Southeastern Consulting Group, Inc. v. Maximus, Inc.*, 387 F.2d 681 (S.D. Miss. 2005) (holding dismissal of suit was not appropriate when another federal court was the agreed venue under forum-selection clause); *Wal-Mart Stores, Inc. v. QORE, Inc.*, 2007 WL 2769835 (N.D. Miss. September 20, 2007) (holding where transfer of venue to another federal court is an option, a § 1404 motion to transfer venue under *Stewart* is the proper procedural means for enforcing a forum-selection clause); *Williamson-Dickie MFG. Co. v. M/V Heinrichj*, 762 F.2d 1023 (S.D. Tex. 2011) (same); *Canvas Records, Inc. v. Koch Entertainment Distribution, LLC*, 2007 WL 1239243 (S.D. Tex. April 27, 2007) (holding that the "proper procedure to enforce a forum-selection clause that provides for suit in another federal court is through Section 1404(a) and *Stewart's* balancing test."); *Pinnacle Interior Elements, Ltd. v. Panalpina, Inc.*, 2010 WL 445927, 6-7 (N.D. Tex. 2010) (same); *Brock v. Baskin-Robbins USA Co.*, 113 F. Supp. 2d 1078 (E.D. Tex. 2000) (same); *Asar Family Holdings, LLC v.*

Fifth Circuit's recent decision did not drastically change the landscape for enforcement of such clauses, it merely endorsed these past holdings.

Petitioner argues that "to relegate enforcement of forum-selection clauses to a discretionary convenience analysis under Section 1404(a), is to invite error and erode the right to contract." Pet. 25. But the need for parties to have contractual certainty is not incompatible with the flexible case-by-case analysis demanded by § 1404(a).

The truth is that it is not certainty that Petitioner seeks, rather it is an iron-clad right to forum-shop, without any regard for collateral effects of this decision on the public or the courts. Congress's decision to subject forum-selection clauses to the individualized, case-by-case review of § 1404 does not eliminate certainty; it merely requires the parties to consider factors beyond their own indiscriminate desires—including institutional concerns—in deciding where the agreed-upon forum will be located. Parties remain free to contract for an agreed upon forum within the limits prescribed by Congress. The more consideration parties give to these factors at the outset, the more certain they may be that such a clause will be enforced.

Direct TV, Inc., 2010 WL 3732933 (W.D. La. September 20, 2010) (surveying cases from Fifth Circuit district courts and holding motion to dismiss pursuant to 12(b)(3) and motion to transfer under 28 U.S.C. § 1406 is not proper where forum selection clause provides for venue in another district court); *Dorsey v. Northern Life Ins. Co.*, 2004 WL 2496214, at *9 (E.D. La. November 5, 2004); *CamSoft Data Sys., Inc. v. S. Electronics Supply, Inc.*, CIV.A. 09-1047-JJB, 2010 WL 3199949 (M.D. La. Aug. 12, 2010).

Finally, while the analysis differs, the result between § 1404 and § 1406 will be the same in all but extreme cases. Petitioner simply fails to acknowledge that this case, in which every private and public interest factor relevant to a § 1404(a) analysis other than the boilerplate forum-selection clause itself, favors the Western District of Texas is, in fact, an exceptional case.

CONCLUSION

J-Crew Management, Inc. respectfully prays that this Court deny the Petition for Certiorari, and respect the high bar that must be met to obtain mandamus relief.

Respectfully submitted,

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REPLY BRIEF

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IN THE

Supreme Court of the United States

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

J-CREW MANAGEMENT, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF

"*Atlantic Marine* is a troubling decision. Parties to contracts generally believe they have bargained for certainty and predictability when including a forum selection clause in their contracts. If such clauses are as easily avoided as *Atlantic Marine* suggests, that certainty and predictability will disappear." David Herr and Steve Baicker-McKee, *Law and Motion*, 28 FED. LITIGATOR 6 (Feb. 2013). Atlantic Marine Construction Company, Inc.'s ("Atlantic Marine") Petition presents an excellent opportunity for this Court to resolve the well-developed circuit split regarding enforcement of forum-selection clauses that has been exacerbated by the Fifth Circuit's decision in

this case. *See* Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Petitioner ("Chamber Br.") at 4-6. Continued uncertainty on this issue will needlessly spawn more wasteful litigation about where to litigate.

A. The Parties Agree There Is a Well-Developed Circuit Split

J-Crew Management, Inc. ("J-Crew") acknowledges the circuit split regarding the principal issue raised in Atlantic Marine's Petition – whether a valid forum selection clause designating a federal forum (i) may be enforced under Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406, or (ii) is merely a factor to consider in the discretionary balancing analysis for convenience transfers under 28 U.S.C. § 1404(a). *See, e.g.*, Opp. at 22 (recognizing "the well-developed disagreement among circuits"). "Since the Supreme Court has not determined the basis for a motion to enforce a forum selection clause (i.e., is the motion to be treated as asserting improper venue under 28 U.S.C. § 1406(a) or seeking convenience under 28 U.S.C. § 1404(a)), and is the motion properly brought under Rule 12(b)1, 3, or 6, the practitioner must check to see if there is controlling law on these issues in the district where the venue motion would be brought." 1 ROBERT L. HAIG, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §3:34 at 251 (3d ed. 2011). The procedures currently vary from circuit to circuit, resulting in repeated litigation over the enforceability of forum-selection clauses.[1]

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[1] J-Crew suggests there is confusion on the rules to apply within the Second and Seventh Circuits. *See* Opp. at 12 n.5 & 14. Atlantic Marine disagrees. The decisions in *TradeComet LLC.com v. Google, Inc.*, 647 F.3d 472 (2d Cir. 2011), and

Confusion over this issue continues to have numerous, material consequences for litigants: "The basis for the motion can affect when the motion may be brought, what materials may be considered, what remedy may be granted, and what law governs the action after any transfer." 1 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §3:33 at 241-42. The split in authority also has created opportunities for plaintiffs to shop for a favorable forum to avoid their agreements.[2] *See* Chamber Br. at 16-17. If the Fifth Circuit's decision is upheld, courts should anticipate additional litigation under 28 U.S.C. § 1404(a), as parties take their chances to avoid contractually-chosen forums as a matter of convenience and discretion.[3]

Muzumdar v. Wellness Int'l Network, Ltd., 438 F.3d 759 (7th Cir. 2006), speak for themselves. Regardless, J-Crew's argument highlights the great uncertainty that exists on how to enforce forum-selection clauses. There is no question that the decisions of the Eighth, Ninth, and Eleventh Circuits are in accord with Atlantic Marine's position.

[2] As *Amicus Curiae* Texas Civil Justice League correctly points out, the opportunities for forum shopping under the Fifth Circuit's decision exist both among the circuit courts following different interpretations of the law, as well as between federal and state courts in Texas. *See* Brief of *Amicus Curiae* Texas Civil Justice League in Support of Petition for Writ of Certiorari at 4-5.

[3] J-Crew argues Atlantic Marine's Petition should be denied because "this case does not permit the Court to resolve the lingering question as to whether dismissal based upon a forum-selection clause pursuant to Rule 12(b)(6) would be appropriate." Opp. at 12-13. A separate circuit split regarding the application of Rule 12(b)(6) does not diminish the well-developed circuit split regarding the roles of Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. §§ 1404(a) & 1406. That there are circuit splits on other issues involving forum-selection clauses highlights the im-

B. This Case Presents a Good Vehicle to Resolve the Split

Atlantic Marine and J-Crew agree that mandamus is the "generally accepted" way "to correct clearly erroneous denials of motions to transfer venue," given the difficulty of obtaining direct appellate review on the issue. *See* Opp. at 8. The Chamber of Commerce emphasized this point, explaining that "the court of appeals' mandamus ruling is not merely an appropriate vehicle for resolving the well-developed circuit split, it may well present an uncommon opportunity for the Court to do so." *See* Chamber Br. at 7. Without review on mandamus, it is likely that the issues presented in Atlantic Marine's Petition, which have divided the circuit courts, will continue to evade review.

The Fifth Circuit's decision is based on a fully-developed venue record. If Atlantic Marine must wait until the end of the litigation to obtain review of the venue determination, it will be deprived of the contractual benefit for which it negotiated in its contract with J-Crew. A decision on final appeal will not restore Atlantic Marine's lost contractual right, nor will it change the analysis of the purely legal issues.

The Court's resolution of the legal issues presented in Atlantic Marine's Petition will in no way impact the standard for mandamus relief. *C.f.*, Opp. at 8-9. Atlantic Marine petitions for review because the Fifth Circuit's decision is based upon erroneous conclusions of law. The lower courts have no discre-

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portance for this Court to provide guidance and to begin unwinding and resolving the tangled web of procedures employed today.

tion to determine the law. *See Koon v. United States*, 518 U.S. 81, 100 (1996) (a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law). If Atlantic Marine is correct on the substantive legal questions, then the results in the courts below would be patently erroneous and Atlantic Marine's right to mandamus relief would be clear and indisputable.

J-Crew's claim that the existence of a circuit split precludes mandamus relief is wrong. *See* Opp. at 7-8. The right to mandamus relief does not turn on a subjective analysis of whether the governing law is "clear and indisputable." Instead, this Court's precedent shows that review of legal issues in the context of a mandamus proceeding is proper, despite the existence of a circuit split on the controlling issue. *See, e.g., Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 348 (1988) (resolving circuit split in the context of a mandamus proceeding). Circuit court confusion over the meaning of this Court's decision in *Stewart* does not preclude review here. *See, e.g., Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004) (resolving confusion over meaning of Supreme Court precedent on review of a mandamus proceeding); *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2330-31 (2011) (resolving disputed issue of law then remanding for consideration of the right to mandamus relief in light of the Court's decision).

The Fifth Circuit's decision resulted in a majority opinion and special concurrence that provide focused and detailed analysis of the majority and minority viewpoints regarding the disputed legal question. Consequently, this case presents not only an appro-

priate vehicle for resolution of the growing circuit split, but a rare opportunity.

C. Congress Approves of Contractual Forum Choices

The Fifth Circuit recognized that the majority of circuit courts do not agree with its position. *See* Pet. 5a. The determination of which side of the debate is correct is for the merits stage of this case. However, J-Crew is wrong when it suggests that Congress has weighed in on this issue in the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (the "Clarification Act"). In the Clarification Act, Congress amended the wording of the convenience transfer provision of 28 U.S.C. § 1404(a). Congress made no changes to Rule 12(b)(3) or to 28 U.S.C. § 1406. The changes to Section 1404(a) were intended to abrogate the rule from *Hoffman v. Blaski*, 363 U.S. 335 (1960), that "the transferee court must have personal jurisdiction independent of the defendant's consent" before a Section 1404(a) transfer would be allowed. *See* 17 MOORE'S FEDERAL PRACTICE §111.12[1][c] (3d ed. 2012). *See also* H.R. REP. 112-10, 2011 U.S.C.C.A.N. 576, 580 & n. 17.

J-Crew's selective quotation of H.R. REP. 112-10 is out of context.[4] *See* Opp. at 16 & 21. Congress did not silently resolve the circuit split over the scope of FED. R. CIV. P. 12(b)(3) and 28 U.S.C. § 1406 by overruling the majority position. To the contrary, Congress

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[4] J-Crew's quotation on page 21 of its Opposition is misleading. J-Crew states a venue transfer would only be permissible if the parties agreed *and* the convenience factors weighed in favor of transfer. *See* Opp. at 21. Clearly, this is not what Congress wrote or intended. The House Report addressed only "such transfers" – meaning transfers under Section 1404.

expressed its approval for contractual forum-selection clauses. *See* Opp. at 17 ("Judge Haynes correctly noted in her concurrence that the Venue Clarification Act is an expression of congressional intent to encourage forum-selection clauses.").

D. The Parties Also Agree There Is a Circuit Split on the Application of Section 1404(a)

J-Crew recognizes there is a circuit split on the burden of proof when forum-selection clauses are analyzed under 28 U.S.C. § 1404(a). *See* Opp. at 19. J-Crew admits the Third and Eleventh Circuits place the burden on the party challenging enforcement of the clauses, whereas the Fifth and Ninth Circuits place the burden on the party seeking to enforce the clause by transfer. *See* Opp. at 19.

The allocation of the burden matters because, under the correct burden, the presumption should be that the contractually-chosen forum is the "convenient" forum for disputes. *See Moses v. Business Card Exp., Inc.*, 929 F.2d 1131, 1139 (6th Cir. 1991); *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1293 (7th Cir. 1989). A party should not be able to challenge the presumptively convenient forum based on alleged inconveniences that were foreseeable at the time of contracting. *See M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 17-18 (1972). The Fifth Circuit, by contrast, allowed J-Crew to avoid its contract based on factors (such as the location of its subcontractors) that were clearly foreseeable at the time of contracting. *See* Pet. App. 11a; Opp. at 2.

J-Crew identified no inconveniences of a Virginia forum that it could not have foreseen. Accordingly,

proper placement of the burden of proof should have been dispositive of the transfer question.[5]

E. This Case Presents an Issue of National Importance that Should Be Resolved Now

Asking a court to enforce a freely negotiated contract designating the forum for disputes is not an attempt to "forum-shop" (as J-Crew claims). Opp. at 24. Although 25 years may have passed since this Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), the record during that time period is one of wasteful litigation over venue disputes with the result being a widening circuit split over the enforcement of forum-selection clauses. Parties should not be able to avoid their agreements merely on a balancing of convenience factors that were known (or knowable) at the time of contracting.

J-Crew's argument – that review of the issues raised by Atlantic Marine's Petition is not needed because "businesses engaged in interstate commerce have flourished over the past 25 years despite the split in authority" (Opp. at 23) – proves too much. Contracting parties should be free (within the limits

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[5] In footnote 2, J-Crew argues that Texas "has a strong interest in having local construction disputes decided in Texas." Opp. at 4. The district court correctly dismissed this argument as inapplicable because the construction project was on a federal enclave, which was not subject to the Texas statute J-Crew cites. *See* Pet. App. at 29a-32a (citing *Adams v. Calvert*, 396 S.W.2d 948, 949 (Tex. 1965) (recognizing that Fort Hood is a federal enclave)). Moreover, the parties' contract is hardly local to Texas. It is between parties from Virginia and Texas, regarding work to be performed on a federal enclave, under a contract issued by the Army Corps of Engineers in Alabama, with payment funded from Tennessee.

of *Bremen*) to negotiate a forum in which to resolve disputes. And, the enforcement of those agreements should not vary depending on where the plaintiff chooses to sue. This is not an "extreme case," as J-Crew suggests. *See* Opp. at 25. Instead, this case presents a commonly occurring problem for parties engaged in interstate commerce. The Chamber of Commerce and the Texas Civil Justice League each filed *amicus* briefs in support of Atlantic Marine's Petition, asking the Court to resolve the circuit split. Like Atlantic Marine, the Chamber and the TCJL believe that contracts should be enforced as written.

CONCLUSION

Atlantic Marine Construction Company respectfully prays that this Court grant its Petition for Writ of Certiorari, reverse the decision of the United States Court of Appeals for the Fifth Circuit, and enter an order directing that this case be dismissed or transferred to the United States District Court for the Eastern District of Virginia, Norfolk Division.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

J-CREW MANAGEMENT, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing more than 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Among its members are companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of concern to the nation's business community.

Many of the Chamber's members and affiliates include forum selection clauses in their business contracts. As a result, the questions presented in this case concerning the enforcement of such clauses significantly affect the interests of the Chamber and its members. By declining to enforce a forum selection clause in an agreement that was negotiated in an arms-length transaction between experienced business entities, the decision below frustrates the legitimate contractual expectations of thousands of businesses with similar contract provisions. If permitted to stand, it will undermine the ability of parties to structure their business contracts so as to select in advance and limit the fora in which disputes

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[1] After timely notification pursuant to Rule 37.2(a), the parties consented to the filing of this brief, and their consent letters are on file with the Clerk. In accordance with Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amicus*, its members, or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

will be litigated. It also will likely discourage businesses from expanding the geographic reach of their operations, for fear of being unable to control and limit their litigation costs. In addition, the decision below invites uncabined forum-shopping because it expands and perpetuates the current lack of federal judicial uniformity in the enforcement of forum selection clauses. For all of these reasons, the Chamber has substantial interests in the Court's review of the decision below.

INTRODUCTION

In *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15 (1972), this Court held that forum selection clauses "are prima facie valid" and should be enforced "unless [the party seeking nonenforcement] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." See also *id.* at 15 ("the forum clause should control absent a strong showing that it should be set aside").[2] While *Bremen* involved a forum selection clause that was the product of "an arm's-length negotiation by experienced and sophisticated businessmen," *id.* at 12, the Court subsequently relied on its reasoning in *Bremen* to enforce a "nonnegotiated forum-selection clause" in a "form contract" (a cruise ship ticket).

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[2] *Bremen*, 407 U.S. at 10-11, cited with approval this Court's earlier holding in *Nat'l Equip. Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 315 (1964), in which the Court upheld a farm equipment lease provision in which the Michigan lessee agreed to a New York agent for purposes of service of process. As the Court explained, "[t]he clause was inserted by the petitioner and agreed to by the respondents in order to assure that any litigation under the lease should be conducted in the State of New York." *Id.*

Carnival Cruise Lines, Inc. v. *Shute*, 499 U.S. 585, 593 (1991).

Contrary to these seemingly well-settled principles, the decision below declined to enforce a negotiated forum selection clause between experienced business entities providing that all disputes would be litigated in Virginia. By affirming the denial of petitioner's motions to dismiss or transfer respondent's suit filed – in clear breach of the parties' agreement – in federal district court in Texas, the court below has deepened an already serious conflict among the Circuits and presented this Court with a cleanly presented question that warrants further review.

The court of appeals first held that petitioner's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(3)[3] and 28 U.S.C. § 1406[4] was not an appropriate procedural mechanism for challenging venue because, in its view, the forum selection clause did not render venue improper in the chosen forum. It then held that the appropriate mechanism was 28 U.S.C. § 1404,[5] which relegates transfer decisions to the discretion of district court judges, based upon their balancing of a variety of practical and equitable factors in addition to the existence of the forum

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[3] Rule 12(b)(3) provides for a motion to dismiss for improper venue.

[4] Section 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

[5] Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

selection clause. The court of appeals then affirmed the district court's determination under Section 1404's balancing test that petitioner had not satisfied its burden of showing that a transfer was warranted under the totality of the circumstances of this case.

The decision below starkly illustrates that the use of Section 1404 to resolve challenges to lawsuits filed in violation of forum selection clauses, rather than Section 1406 and the standards that this Court announced in *Bremen*, eviscerates the legitimate contractual expectations of parties who relied on such clauses to limit their litigation costs and avoid burdensome pre-trial motions. Forum selection clauses should be enforced as written, not treated as mere factors that are weighed as part of a free-wheeling and inherently unpredictable balancing test. For these reasons, as discussed more fully herein, the Court should grant the petition for certiorari and reverse the decision below.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S DECISION WIDENS A LONGSTANDING CIRCUIT CONFLICT ON THE ENFORCEABILITY OF FORUM SELECTION CLAUSES AND PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING IT.

As petitioner has shown, there is a well-developed split in the Circuits as to the proper procedural mechanism and substantive standards for addressing challenges to lawsuits that are filed in violation of forum selection clauses. Pet. 12-18. Several courts of appeals (a majority of those that have considered the issue) instruct district courts to entertain such challenges through motions under Section 1406 and

to apply the *Bremen* standards.[6] Other courts of appeals (a minority) limit district courts' review of such challenges to motions under Section 1404, which leaves enforcement of the forum selection clause to the district courts' seemingly boundless discretion.[7] In the decision below, the Fifth Circuit acknowledged this conflict and then widened and deepened it by aligning itself with the minority view. Pet. App. 5a & n.13 ("We agree with [the minority] approach") (citing *Kerobo* and *Jumara*).

This square and acknowledged circuit split is more than sufficient reason to grant certiorari. Moreover, the decision below makes clear that the split is not going to resolve itself or go away. While the trend in recent years had been for courts of appeals to adopt the view that favors enforcement of forum selection clauses (the current majority view), the Fifth Circuit has now expanded and perpetuated the conflict by aligning itself with the older, minority view that subjects the enforcement of forum selection clauses to a multi-factor balancing test. In light of the continuing disagreement among the Circuits, the concurring judge on the panel essentially invited this Court's review by encouraging the parties to file a petition for *certiorari* so that the Court could provide

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[6] *See Union Elec. Co.* v. *Energy Ins. Mut. Ltd.*, 689 F.3d 968, 970-73 (8th Cir. 2012); *TradeComet.com LLC* v. *Google, Inc.*, 647 F.3d 472, 474-78 (2d Cir. 2011); *Slater* v. *Energy Servs. Grp. Int'l, Inc.*, 634 F.3d 1326, 1332-33 (11th Cir. 2011); *Hillis* v. *Heineman*, 626 F.3d 1014, 1016-17 (9th Cir. 2010); *Muzumdar* v. *Wellness Int'l Network, Ltd.*, 438 F.3d 759, 760-62 (7th Cir. 2006).

[7] *See Kerobo* v. *Sw. Clean Fuels, Corp.*, 285 F.3d 531, 535 (6th Cir. 2002), and *Jumara* v. *State Farm Ins. Co.*, 55 F.3d 873, 877-79 (3d Cir. 1995).

"further guidance" on the issue. Pet. App. 25a. The Court should accept that invitation.

"Further guidance" is sorely needed because it is clear that if Atlantic Marine had challenged respondent's attempt to avoid the forum selection clause in any of the Circuits following the majority approach, the clause would have been enforced and this litigation would be proceeding in Virginia. The decision below thus extends and perpetuates the fundamentally inconsistent legal regimes for the enforcement of forum selection clauses that exist in different Circuits. The prospect that parties who enter into forum selection agreements have categorically different contract protections in different Circuits creates significant commercial uncertainty and is intolerable. This is precisely the kind of decision by geography that this Court grants certiorari to prevent.

This case is an appropriate vehicle for resolving this circuit split because the facts governing the issue are straightforward and fully developed in the record. In addition, the question at the crux of the conflict is cleanly presented and outcome determinative in this case. The Court would have the benefit of two thorough but opposing analyses by the panel because even though Judge Haynes' opinion was nominally a concurrence, her analysis "diverge[d]" from that of the majority on the legal question presented by the petition. Pet. App. 14a. By granting the petition, this Court could and should provide meaningful guidance concerning the enforceability of forum selection clauses – an area that it has not addressed in more than two decades.

Although the Court generally disfavors review when a case is in an interlocutory posture, the interlocutory nature of this case should not be an

impediment to review because "there is [an] important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 (9th ed. 2007). The Fifth Circuit squarely addressed the pertinent legal issue in the context of resolving petitioner's mandamus petition and took a clear position on the mature circuit conflict that merits this Court's review. Pet. App. 4a-5a (acknowledging the division in the Circuits and adopting the minority approach).

Moreover, as a practical matter, mandamus is the most likely vehicle for the question presented to reach this Court. As petitioner demonstrated, mandamus is the only means available for immediate appellate review of the denial of a motion to change the venue of a lawsuit. Pet. 7-8. Appeals of final judgments are unlikely to arise because parties have a strong incentive to settle cases when they are forced to proceed in an inconvenient forum and, for the few cases that are litigated to final judgment, parties are unlikely to appeal venue issues after the proceedings have concluded. Thus, the court of appeals' mandamus ruling is not merely an appropriate vehicle for resolving the well-developed circuit split, it may well present an uncommon opportunity for the Court to do so. Indeed, this Court has routinely granted review in cases raising venue and similar issues by way of mandamus. See, *e.g.*, *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 347-48 (1988) (whether a district court can remand a properly removed case to state court when all federal claims have been eliminated); *Thermtron Prods. Inc.* v. *Hermansdorfer*, 423 U.S. 336, 341-42 (1976) (whether a district court can remand a properly removed

diversity case for reasons not authorized by statute), *abrogated on other grounds by Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996); *Van Dusen* v. *Barrack*, 376 U.S. 612, 614 (1964) (construction and application of Section 1404); *Hoffman* v. *Blaski*, 363 U.S. 335, 337-39 (1960) (same). For all of these reasons, the Court should grant this petition and resolve the circuit conflict now.

II. THE FIFTH CIRCUIT'S DECISION UNDERMINES CONTRACTUAL CERTAINTY AND ENCOURAGES FORUM-SHOPPING.

The Chamber agrees with petitioner's analysis demonstrating that the Fifth Circuit's decision to treat the enforcement of forum selection clauses as a discretionary matter under Section 1404 is fundamentally flawed and misapplied this Court's decision in *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22 (1988). See Pet. 18, 19-21, 24. The Chamber also agrees that the court of appeals created further circuit disarray by placing the burden on petitioner to prove that a transfer was warranted under Section 1404 and committed further legal error by considering inconvenience to the parties that was foreseeable at the time of contracting. *Id.* at 21-25. The Chamber will not parrot petitioner's analysis of those issues, but instead amplifies additional reasons why the decision below warrants this Court's review. *First*, the decision below severely undermines contractual certainty with respect to forum selection clauses – a result that will discourage many forms of legitimate and beneficial business activity. *Second*, the decision below encourages forum-shopping that serves no useful purpose and creates the kind of unfairness this Court long has discouraged. See *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 74-77 (1938); *Hanna* v. *Plumer*, 380 U.S. 460, 467-68 (1965).

a. Forum selection clauses serve important purposes in many business contracts. As this Court has recognized, forum selection clauses allow both parties to a contract to "eliminat[e] . . . uncertainties" concerning the possible fora of a contract dispute, and thereby eliminate the risk of a highly inconvenient forum, "by agreeing in advance on a forum acceptable to both parties." *Bremen*, 407 U.S. at 13; *Carnival*, 499 U.S. at 593-94 ("a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended"). Relatedly, by determining the forum in the contract, these clauses allow the parties (and courts) to avoid "cost[ly]" and "time-consuming pretrial motions" on the question of where a dispute should be resolved. *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring); *Carnival*, 499 U.S. at 594 (forum selection clauses "spar[e] litigants the time and expense of pretrial motions to determine the correct forum and conserv[e] judicial resources that otherwise would be devoted to deciding these motions"); cf. *Bowen* v. *Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting) ("Nothing is more wasteful than litigation about where to litigate . . . ."). Because forum selection clauses promote convenience and predictability, they are "a vital part of the agreement" and can "figur[e] prominently" in the negotiation of "monetary terms." *Bremen*, 407 U.S. at 14. This is why this Court views them as presumptively enforceable.

Forum selection clauses also allow parties to limit the fora in which they can be sued, which this Court has recognized can reduce their potential litigation costs. *Carnival*, 499 U.S. at 593-94 (finding that cruise line had an interest in "limiting the fora in which it potentially could be subject to suit" and that

the cost "savings that the cruise line enjoys by limiting the fora in which it may be sued" can be passed on to passengers); *Bremen*, 407 U.S. at 12-13 (finding that parties to an international ship towing contract had "compelling reasons" to negotiate a forum selection clause in order to avoid the potential for litigation "in any jurisdiction in which an accident might occur" along the towing route).

This benefit of forum selection clauses is particularly important to small businesses, especially when they seek to expand their geographical scope of operations. Small businesses have a particularly vital interest in "keep[ing] the cost of potential disputes at a minimum," including by limiting the fora in which they litigate disputes and by "bring[ing] a lawsuit or defend[ing themselves] as close to home as possible." Trippe S. Fried, *Maintaining the Home Court Advantage: Forum Shopping and the Small Business Client*, 6 Transactions: Tenn. J. Bus. L. 419, 419 (2005). Forum selection clauses are therefore an essential tool for small businesses to control and limit their litigation costs. *Id.* at 434 (encouraging small business to use "written agreements with vendors and customers" that include forum selection clauses).

The concurring Circuit Judge properly recognized that petitioner Atlantic Marine is a prime example of a company that "conduct[s] business throughout a broad geographical area" and, therefore, "rel[ies] on forum-selection clauses to ensure that [it] can anticipate business costs and avoid litigation in a plethora of possible venues." Pet. App. 24a. Atlantic Marine is "a family owned and operated" general contractor that is certified by the Small Business Administration as an 8(a) contractor. See Atlantic Marine Construction Co., *Who We Are*, http://amccinc.com/WhoWeAre.aspx (last visited Feb. 21, 2013).

Although it is headquartered in Virginia Beach, Virginia, it has "completed successful projects from . . . Virginia to California for various branches of the Armed Services." *Id.* As in the instant subcontract, Atlantic Marine negotiates and relies upon forum selection clauses in its agreements. It is thus the prototypical entity that requires a predictable rule of enforcement of forum selection clauses to allow it to operate interstate.

Because of their benefits to parties, forum selection clauses are widely used in contracts of all types, by businesses large and small. See *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) ("particularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction"); 14D Charles Alan Wright, *Federal Practice and Procedure: Jurisdiction* § 3803.1, at 50 (3d ed. 2007) (forum selection clauses "appear in contracts of every description" and "are being used with greater frequency"); Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 Vand. L. Rev. 1975, 1978 (2006) ("companies frequently agree to choice of law and choice of forum provisions when they enter into contracts," including contracts that "cover a wide range of corporate activities, such as employment and severance agreements, dispute settlement, mergers and asset purchases, financing agreements, and securities transactions"); Maral Kilejian & Christianne Edlund, *Enforceability of Choice of Forum and Choice of Law Provisions*, 32 Franchise L.J. 81, 81 (2012) ("Most franchise agreements contain both choice of forum and choice of law clauses, which usually have a connection with the

franchisor's home state"); Scott J. Burnham, *Contractual Relations In Small Business: Do The Benefits Of A Custom-Made Contract Outweigh The Costs?*, 7 J. Small & Emerging Bus. L. 425, 429 (2003) (choice of forum clauses "[i]ncreasingly" are included in small business contracts).

Like any provision that businesses agree to and choose to put in their contracts, businesses want forum selection clauses to be enforced. Such clauses are included in contracts to create certainty about the venue of potential litigation, and such certainty is often a prerequisite to the transaction or relationship going forward. Cf. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) ("A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.") (addressing international arbitration clause). As a result, commercial certainty is destabilized when judicial enforcement is lacking or unreliable, such that parties have no way of knowing whether their forum agreement will have binding effect. See *Norfolk & W. Ry.* v. *Am. Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991) ("A contract has no legal force apart from the law that acknowledges its binding character."). Without predictable and enforceable contract rights, business activity cannot flourish.

The decision below fosters commercial uncertainty because it creates an unreliable regime for the enforcement of forum selection clauses. Unlike the Circuits that permit challenges to lawsuits filed in violation of forum selection clauses to be brought under Section 1406, and that presumptively enforce those clauses pursuant to the *Bremen* standards, the

Fifth Circuit has now held that such challenges must be brought under Section 1404. Section 1404, however, is not a suitable or effective means of enforcing forum selection clauses because it is merely a transfer mechanism subject to unpredictable discretionary decision-making, as occurred in this case. The statute permits, but does not require, district courts to order venue transfers in certain circumstances. See 28 U.S.C. § 1404(a) ("a district court *may* transfer") (emphasis added). Because Section 1404 leaves enforcement of forum selection clauses in individual cases to the option of district court judges,[8] it cannot provide the certainty that contracting parties require in order to enter into business transactions. A discretionary approach, by its nature, undermines rather than promotes contractual certainty.

In addition, Section 1404 neither mentions forum selection clauses nor sets a standard that requires that they be presumptively enforced – or even considered. Instead, it directs district courts to consider "the convenience of parties and witnesses," and "the interest of justice." District courts therefore employ various balancing tests to resolve Section 1404 motions that focus primarily on the convenience factors that Congress identified in the statute, and only consider the existence of a forum selection clause as a factor that is weighed against many others. See *Stewart*, 487 U.S. at 29 ("A motion to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors"). The

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[8] *See Stewart*, 487 U.S. at 29 ("Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'") (quoting *Van Dusen*, 376 U.S. at 622).

district court here, for example, listed eight private and public interest factors that it considered relevant under Section 1404, although it emphasized that these factors were "nonexhaustive." Pet. App. 35a-36a & n.2. The court did identify the forum selection clause as a "factor," but emphasized that it was "only one" factor and "not entitled to dispositive weight." *Id.* at 36a, 39a.

The use of balancing tests under Section 1404, like the use of discretion itself, wholly eviscerates the purpose and contractual certainty of forum selection clauses. Under Section 1404, parties cannot predict with any confidence whether the forum selection clause in their case will be enforced. This is true notwithstanding this Court's statement in *Stewart*, 487 U.S. at 29, that the presence of a forum selection clause "will be a significant factor that figures centrally in the district court's [Section 1404] calculus." Under a regime where forum selection clauses are merely one "factor" that district courts consider as part of a balancing test that embraces a seemingly endless number of factors, business organizations simply cannot rely on their enforcement. In this regard, although the district court below claimed to have considered the parties' forum selection clause, it did not enforce it and, as the concurring Circuit Judge observed, there is "no practical difference between this district court opinion and that of a district court that was assessing this same case without a forum-selection clause." Pet. App. 24a.

The decision below therefore creates a regime in which forum selection clauses are not enforced as a matter of course according to their terms, like other contract provisions. Instead, enforcement is subject "to the vicissitudes of virtually unfettered judicial

discretion." Pet. App. 25a. If permitted to stand, this ruling will have several detrimental consequences for the business community and for business activity. It will frustrate the legitimate contractual expectations of the thousands of businesses that have similar clauses in their contracts. No matter what forum these businesses have chosen in their contracts, they now face the prospect that the Fifth Circuit will allow a lawsuit to be litigated there, in violation of the parties' agreement. They also face the prospect of costly and time-consuming pre-trial motion practice on venue issues in the Fifth Circuit – something that their forum selection clause was designed to avoid, and would prevent in a majority of Circuits.

The greater economic harms, however, will arise with respect to future transactions. If forum selection clauses are not reliably enforced in the Fifth Circuit (and the Third and Sixth Circuits), then businesses will not be able to structure their contracts so as to select in advance and limit the fora in which disputes can be litigated. This will prevent them and their customers from realizing the substantial efficiencies that can be achieved from limiting litigation costs. More importantly, it might discourage certain transactions and forms of businesses activity altogether. If businesses, particu-larly small businesses, cannot control and limit their litigation costs through forum selection clauses, they likely will become reluctant to pursue particular transactions or business strategies, such as expanding the geographic reach of their operations. In this regard, Atlantic Marine is pursuing review in this case because the decision below has substantial consequences for its business model (and undoubtedly that of other government contractors that contract

with multiple subcontractors from different states to perform the government's work).

b. The current lack of federal uniformity in enforcement of forum selection clauses, exacerbated by the decision below, plainly invites forum-shopping. Plaintiffs who want to evade forum selection clauses can find a favorable reception in the Third, Fifth, and Sixth Circuits, which will evaluate a challenge to their maneuver under a multi-factor balancing test that focuses largely on convenience factors, and that relegates the parties' contractual agreement to just one factor in the mix. Accordingly, any plaintiff who can find a basis under 28 U.S.C. § 1391 for venue in these Circuits will be drawn to them, regardless of what they contractually agreed to. And businesses in all Circuits can be victims of this tactic, since it can be pursued regardless of where the defendant is located or incorporated.

Moreover, as petitioner notes, the Fifth Circuit's approach itself promotes forum shopping because it presents the opportunity for plaintiffs to control the law that will govern a dispute, even if they are ultimately unsuccessful in controlling the forum. Pet. 20-21. Although many contracts contain choice of law provisions, the background rule is that when a case is transferred pursuant to Section 1404, the applicable law transfers as well. See *Van Dusen*, 376 U.S. at 639 ("[T]he transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms."); Pet. 20-21. Thus, even when a federal district court in the Fifth Circuit or one of the minority Circuits transfers a case pursuant to Section 1404 that was filed in violation of a forum selection clause, the

plaintiff can still "benefit from the choice-of-law rules of the initial forum." Ryan T. Holt, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 Vand. L. Rev. 1913, 1931 (2009); see also *id.* (the plaintiff can thereby gain "a benefit that was not bargained for," even if the forum selection clause is enforced).

In contrast, when a forum selection clause is enforced through a Rule 1406 dismissal or transfer, the choice of law rules of the new forum will govern. *Id.* at 1931-32; Pet. 21. This choice of law implication is another substantive inconsistency spawned by the lack of a uniform federal procedure to address this venue issue. And it provides yet another basis for litigants to ignore forum selection clauses and engage in forum-shopping with all of the inherent inequality that conduct entails. *Erie*, 304 U.S. at 74-77; *Hanna*, 380 U.S. at 467-68.

III. THE FIFTH CIRCUIT'S DECISION POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

The court of appeals' ruling that the enforceability of forum selection clauses is at the discretion of district court judges presents a recurring and "important question" of federal law that warrants this Court's review. See Sup. Ct. R. 10(c).

The implications of the issues raised in this case are enormous. As noted, forum selection clauses are widely used by many types of businesses in many types of contracts. See *supra* at 11-12. Because of "the ever-increasing use of forum selection clauses in contracts," the "determination of clause enforcement affects a growing universe of litigants." Holt, *supra*, at 1917.

Moreover, this case and the cases that generated the circuit split all show that circumvention of forum selection clauses is a common and recurring problem. As petitioner showed, such circumvention is frequently successful in those jurisdictions that leave to the discretion of district court judges whether to enforce such clauses based on a multi-factor balancing test. Pet. 25 & n.7 (citing decisions in which district courts have declined to enforce forum selection clauses as a matter of discretion). This problem will only become worse now that the Fifth Circuit has joined the other Circuits that leave the enforcement of forum selection clauses to the election of district court judges, thereby providing potential evaders of such clauses with another set of district court forums in which their harmful strategy faces a reasonable chance of success.[9] It is therefore vital that this Court grant review to protect the reasonable commercial expectations of parties who enter into forum selection clauses and to foreclose the injurious forum shopping that is invited by the current lack of federal uniformity.

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[9] Since the Fifth Circuit issued the decision below, district courts in that Circuit already have relied upon it to deny transfer of cases that were filed by plaintiffs in violation of contractual forum selection clauses. *See, e.g, Vasquez* v. *El Paso II Enters., LLC*, No. EP-12-CV-303, 2012 WL 6160986 (W.D. Tex. Dec. 11, 2012); *Shawn Massey Farm Equip., Inc.* v. *CLAAS of Am., Inc.*, No. 4:12-CV-300, 2012 WL 7004153 (E.D. Tex. Dec. 19, 2012) (recommendation of magistrate judge).

CONCLUSION

For these reasons, and those stated by petitioner, the Chamber urges the Court to grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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February 25, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB 25 2013
OFFICE OF THE CLERK

No. 12-929

IN THE

Supreme Court of the United States

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

J-CREW MANAGEMENT, INC.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* TEXAS CIVIL JUSTICE LEAGUE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

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BRIEF OF *AMICUS CURIAE* TEXAS CIVIL JUSTICE LEAGUE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST OF AMICUS CURIAE

The Texas Civil Justice League ("TCJL") is a nonprofit business association that represents Texas trade and professional associations, entities doing business in Texas, and individual Texas citizens in addressing state and federal legislative and

regulatory issues.[1] It also serves as a clearinghouse for information pertaining to the civil justice system, develops educational and advocacy programs with respect to the judicial system, and provides leadership for Texas business and industry in addressing issues of public concern. TCJL has more than 3,000 members that represent all sectors of the Texas economy, accounting for billions of dollars of capital investment and tens of thousands of jobs in Texas. TCJL members engage in business activities that require certainty and predictability in the civil justice system and the strict enforcement of contracts executed by sophisticated parties.

In this case, the Fifth Circuit declined to issue a writ of mandamus compelling the trial court to enforce a valid forum-selection clause in a contract for the construction of a facility in Texas and to dismiss the case for "improper" venue under Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406(a). Rather, the Fifth Circuit upheld the trial court's ruling that forum-selection clauses are subject to a discretionary balancing test under the convenience transfer rules of 28 U.S.C. § 1404(a). In light of the number of contracts between entities conducting significant and ongoing business operations in Texas, TCJL members have a direct and substantial interest in this question.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a). Copies

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the Texas Civil Justice League or its members made any monetary contribution to the preparation or submission of the brief.

of the requisite consent letters are being filed herewith.

STATEMENT OF THE CASE

TCJL adopts the Statement of the Case contained in Petitioner's Petition for Writ of Certiorari (Pet. 6-10). In addition, TCJL members routinely negotiate and rely on forum-selection clauses in their day-to-day business operations and depend on the state and federal judicial system strictly to enforce valid contracts.

SUMMARY OF ARGUMENT

In this case, the Fifth Circuit's decision contradicts Texas law and encourages forum-shopping, putting Texas businesses at a competitive disadvantage in contract disputes over activities conducted in the state. Costly and extended satellite litigation simply to determine the choice of venue where a contract provision stipulates an otherwise permissible and appropriate forum is antithetical to the stable, predictable, and efficient administration of justice. It also has deleterious effects on the ability of businesses to assess and plan for the potential burdens of dispute resolution, thus skewing the valuation of contract services and introducing unnecessary distortions into the free market.

ARGUMENT

I. TEXAS LAW IS CLEAR THAT FORUM-SELECTION CLAUSES ARE ENFORCEABLE

The Texas Supreme Court has repeatedly granted writs of mandamus to enforce forum-selection clauses under a clear abuse of discretion

standard. *In re ADM Investor Services, Inc.*, 304 S.W.3d 371, 374 (Tex. 2010); *In re AIU Ins. Co.*, 148 S.W.3d 109, 114-115 (Tex. 2004). A trial court abuses its discretion in refusing to enforce a forum-selection clause unless the party opposing enforcement clearly shows that: (1) enforcement would be unreasonable or unjust; (2) the clause is invalid for reasons of fraud or overreaching; (3) enforcement would contravene a strong public policy of the forum where the suit was brought; or (4) the selected forum would be seriously inconvenient for trial. *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 231-32 (Tex. 2008). The party challenging enforcement must meet a "heavy" burden of proof. *AIU*, 148 S.W.3d at 113. Moreover, when the inconvenience of litigating in the chosen forum is foreseeable at the time of contracting, the challenging party must "show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1982); *see also Lyon*, 257 S.W.3d at 234.) The Fifth Circuit opinion stands in stark contradiction to Texas law.

II. THE FIFTH CIRCUIT'S DECISION IN THIS CASE ENCOURAGES CONTRACT EVASION AND FORUM-SHOPPING.

If the Fifth Circuit's decision stands, the Respondent will have successfully evaded a freely negotiated, fair, and uncoerced agreement to litigate a dispute in a Virginia court of otherwise permissible venue. Moreover, the Respondent will have evaded its bargain without any showing of difficulty or inconvenience, much less a showing "that trial in the

contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." The Fifth Circuit has thus encouraged parties to shop for a favorable federal forum in Texas for no other reason than that the party now finds it "inconvenient" to live by its word. TCJL submits that no positive public policy objective is served by allowing forum-shopping of this sort and that absent far more extreme circumstances, a party doing business in Texas should be held to the terms of its bargain.

III. THE FIFTH CIRCUIT'S DECISION PLACES BUSINESSES CONDUCTING ACTIVITIES IN TEXAS AT A DISADVANTAGE VIS-À-VIS COMPETITORS IN OTHER STATES AND NATIONS.

Texas has experienced rapid population and economic growth in the past three decades. The state's strong natural resource base, communications and technology infrastructure, regulatory and liability environment, and relatively low cost of living have attracted significant capital investment and new employment, making Texas one of the best places in the country to conduct business. Nevertheless, as states and foreign nations increasingly compete for investment dollars and employment, even relatively small disturbances in the legal environment can change a business's cost calculations enough to affect adversely a state's economic attractiveness and have real impact on business activity.

A business's ability to enforce contracts in a particular state's judicial system is a significant consideration when attempting to assess and value

the potential cost of dispute resolution, just as exposure to tort or regulatory liability must be carefully weighed when committing the resources of the business. Uncertainty in this regard increases the cost of doing business and enhances the appeal of a forum with bright line legal rules that, among other things, ensure the enforceability of contracts without protracted and wasteful litigation.

Unfortunately, the Fifth Circuit's decision in this case creates such uncertainty. If the decision is not overturned, a business seeking to contract in Texas will have to account for the real and lost opportunity costs of litigating the appropriate forum in which to resolve a dispute, creating an unnecessary burden with no corresponding public policy benefit. Moreover, the decision will discourage parties from agreeing in advance to certain forum-selection choices simply because the law itself is inconsistent and unstable. This state of affairs is hardly a recipe for the efficient administration of justice at any level and should be corrected.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition and reverse the Fifth Circuit decision in this case.

Respectfully submitted,

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JOINT APPENDIX

RECORD
AND
BRIEFS

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Opinion, *J-Crew Management, Inc. v. Atlantic Marine Construction Company, Inc.*, No. A-12-CV-228-LY (W.D. Tex. Aug. 6, 2012) 26a

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

Civil Action No. 1:12-CV-00228-LY

UNITED STATES OF AMERICA, FOR THE USE OF
J-CREW MANAGEMENT, INC.
Plaintiff

VS.

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,
BRUCE W. EXUM, JR., AND LINDA M. EXUM,
Defendants.

RELEVANT DOCKET ENTRIES

DATE FILED	#	DOCKET TEXT
		* * * *
05/09/2012	18	AMENDED COMPLAINT against Atlantic Marine Construction Company, Inc., Bruce W. Exum, Jr, Linda M. Exum amending 1 Complaint., filed by J-Crew Management, Inc. (Basham, Joe) (Entered: 05/09/2012)
		* * * *
05/23/2012	20	MOTION to Dismiss Plaintiff's First Amended Complaint or, Alternatively, Transfer Venue by Atlantic Marine Construction Company, Inc., Bruce W. Exum, Jr, Linda M. Exum. (Attachments: # 1 Exhibit, # 2 Proposed Order)

DATE FILED		DOCKET TEXT
		(Boeck, Christopher) (Entered: 05/23/2012)
06/06/2012	21	BRIEF regarding 20 MOTION to Dismiss Plaintiff's First Amended Complaint or, Alternatively, Transfer Venue by J-Crew Management, Inc.. (Attachments: # 1 Affidavit, # 2 Proposed Order) (Basham, Joe) (Entered: 06/06/2012)
06/13/2012	22	REPLY to Response to Motion, filed by Atlantic Marine Construction Company, Inc., Bruce W. Exum, Jr, Linda M. Exum, re 20 MOTION to Dismiss Plaintiff's First Amended Complaint or, Alternatively, Transfer Venue filed by Defendant Linda M. Exum, Defendant Atlantic Marine Construction Company, Inc., Defendant Bruce W. Exum, Jr. (Boeck, Christopher) (Entered: 06/13/2012)
08/06/2012	23	ORDER GRANTING IN PART AND DENYING IN PART 20 Motion to Dismiss. Signed by Judge Lee Yeakel. (td) (Entered: 08/06/2012)
08/20/2012	24	ANSWER to 18 Amended Complaint by Atlantic Marine Construction Company, Inc. (Boeck, Christopher) (Entered: 08/20/2012)

DATE FILED		DOCKET TEXT
11/29/2012	25	USCA ORDER re: Petition for Writ of Mandamus. (td) Modified on 12/5/2012 to amend text (td). (Entered: 12/05/2012)

* * *

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No.: 12-50826

IN RE ATLANTIC MARINE
CONSTRUCTION COMPANY, INC.,
Petitioner

RELEVANT DOCKET ENTRIES

DATE FILED	DOCKET TEXT
08/16/2012	ORIGINAL PROCEEDING CASE docketed. [12-50826] (SAT)
08/16/2012	PETITION filed by Petitioner Atlantic Marine Construction Company, Incorporated for writ of mandamus [7161833-2]. [12-50826] (SAT)
	* * *
08/27/2012	RESPONSE/OPPOSITION filed by Respondent J-Crew Management, Incorporated Date of service: 08/27/2012 via email - Attorney for Petitioner: Hastings; Attorney for Respondent: Simon [12-50826] REVIEWED AND/OR EDITED. RESPONSE/OPPOSITION [717007 2-1] to the petition for writ of mandamus filed by Petitioner Atlantic

DATE FILED	DOCKET TEXT
	Marine Construction Company, Incorporated in 12-50826 [7161833-2] [12-50826] (Chad B. Simon)
	* * *
08/31/2012	REPLY filed by Petitioner Atlantic Marine Construction Company, Incorporated [7170943-1] to the response/opposition filed by Respondent J-Crew Management, Incorporated in 12-50826 [7170072-21, to the petition for writ of mandamus filed by Petitioner Atlantic Marine Construction Company, Incorporated in 12-50826 [7161833-2]. [12-50826] (MFY)
08/31/2012	COURT DIRECTIVE ISSUED expediting the appeal [7170966-2] Case should proceed directly to OA Calendar? Yes. [12-50826] (MFY)
	* * *
10/03/2012	ORAL ARGUMENT HEARD before Judges Higginbotham, Elrod, Haynes. Arguing Person Information Updated for: William Scott Hastings arguing for Petitioner Incorporated Atlantic Marine Construction Company; Arguing Person Information Updated for: Chad B. Simon arguing for Respondent Incorporated J-Crew Management [12-50826] (SME)

DATE FILED	DOCKET TEXT
11/19/2012	PUBLISHED OPINION FILED. [12-50826 Affirmed] Judge: PEH, Judge: JWE, Judge: CH. (ISSUED AS AND FOR THE MANDATE) [12-50826] (JMA)
11/19/2012	MANDATE ISSUED. [12-50826] (JMA)

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed 05/09/12]

Civil Action No. 1:12-CV-00228-LY

UNITED STATES OF AMERICA, FOR THE USE OF
J-CREW MANAGEMENT, INC.
Plaintiff

VS.

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,
BRUCE W. EXUM, JR., AND LINDA M. EXUM,
Defendants.

PLAINTIFF'S FIRST AMENDED COMPLAINT

The United States of America, for the use and benefit of Plaintiff, J-Crew Management, Inc. ("Plaintiff"), complains against defendants, Atlantic Marine Construction Company, Inc. ("Atlantic"), Bruce W. Exum, Jr., and Linda M. Exum, and for its causes of action respectfully shows as follows:

I. JURISDICTION

1. This Court has original jurisdiction over the subject matter of this action under 28 U.S.C. § 1332 because the amount in controversy exceeds $75,000.00 and there is complete diversity between Plaintiff, a Texas corporation, and Defendants Atlantic (a Virginia corporation), Bruce W. Exum, Jr. (a Virginia resident) and Linda M. Exum (a Virginia resident).

II. VENUE

2. Venue is proper in this Court pursuant to 28 U.S.C. §1331, because the subcontract that is the subject of this lawsuit was entered into and was to be performed in this judicial district.

III. PARTIES

3. Plaintiff, J-Crew Management, Inc., is a Texas corporation authorized to conduct business in this State and maintains a principal place of business at 2123 Grizzly Trail, Harker Heights, Texas.

4. Defendant Atlantic Marine Construction Company, Inc. is a Virginia corporation maintaining a principal place of business in Virginia Beach, Virginia, who has been served with process and appeared through counsel.

5. Defendant Bruce W. Exum, Jr., upon information and belief, is the President and Chief Executive Officer of Atlantic and a trustee of funds paid by the Owner for the benefit of Plaintiff. Bruce W. Exum, Jr. is a resident of Virginia Beach, Virginia, who has been served with process and appeared through counsel.

6. Defendant Linda M. Exum, upon information and belief, is the Vice President of Atlantic and a trustee of funds paid by the Owner for the benefit of Plaintiff. Linda Exum is a resident of Virginia Beach, Virginia who has been served with process and appeared through counsel.

IV. BACKGROUND FACTS

7. This lawsuit arises from a construction project known as the Ft. Hood Child Development Center

No. 1, located at Ft. Hood, in Killeen, Texas (the "Project"). The Project is owned by the United States Government, U.S. Army Corps of Engineers ("Owner" or "Army").

8. Pursuant to an agreement entered into on or about April 16, 2009, the Owner contracted with Atlantic Marine Construction Co., Inc., a Virginia Corporation with its principal place of business in Virginia Beach, Virginia ("Atlantic"), for the performance of Contract No. W912DY-08-D-0029-0001 for the design and construction of the Project ("Prime Contract").

9. Atlantic entered into an agreement with Plaintiff, pursuant to a document titled Subcontract Agreement dated July 29, 2010 (the "Subcontract") attached as Exhibit A, to perform certain work required of Atlantic under the Prime Contract.

10. Plaintiff, pursuant to the Subcontract, is entitled to recover for construction labor, equipment, materials and supplies provided to Atlantic in connection with the Project.

11. To date, Atlantic has made two payments to Plaintiff's subcontractors - $8,000 to Pace Painting ($3,468.50 of which should not have been paid and remains in dispute) and $25,846.12 to Norman Woodworks - leaving a balance of $159,675.87.

V. CAUSES OF ACTION

COUNT ONE
(BREACH OF CONTRACT)

12. Plaintiff repeats and re-alleges the allegations set forth in Paragraphs 1 through 11 above as if such allegations were set forth at length herein.

13. Atlantic entered into a contract with Plaintiff on or about July 29, 2010 to perform to perform certain work on the Project as set forth in more detail in the parties' Subcontract.

14. Plaintiff delivered labor and materials to the Project between July 20, 2010 and November 3, 2011 pursuant to the terms and conditions of the Subcontract.

15. Plaintiff fully performed all of its obligations under the Subcontract.

16. Plaintiff has made a demand upon Defendant Atlantic for payment in the total amount of $159,675.87; however, to date, Atlantic has refused to pay this amount.

17. Atlantic has breached its obligations under the Subcontract by failing to make payments to Plaintiff in accordance with the terms and conditions of the parties' agreement.

18. Plaintiff has incurred damages in the amount of $159,675.87, plus interest and additional costs and fees as a proximate cause of Atlantic's breach of its obligations to Plaintiff under the Subcontract.

COUNT TWO
(*QUANTUM MERUIT*)

19. Plaintiff repeats and re-alleges the allegations set forth in Paragraphs 1 through 18 above as if same were set forth at length herein.

20. Plaintiff provided valuable services and furnished valuable materials to Atlantic for use on the Project between July 20, 2010 and November 3, 2011.

21. The reasonable value of the services and materials Plaintiff provided to Atlantic for use on the Project is $1,015.128.82 of which Plaintiff has been paid only $855,470.95 to date, leaving an unpaid balance of $159,675.87.

22. Atlantic, at the time Plaintiff performed the services and delivered the materials at issue to the Project was aware and/or had reasonable notice that Plaintiff was expecting to be paid for the labor and materials delivered to the project.

23. Atlantic accepted, used and enjoyed the labor and materials Plaintiff provided on the Project.

24. Atlantic would be unjustly enriched in the minimum amount of $159,675.87 if it were allowed to retain the benefit of the labor and materials Plaintiff provided on the project without fully compensating Plaintiff.

25. Atlantic's failure to pay Plaintiff the reasonable value of the labor and materials it delivered to the Project has cause, and will continue to cause Plaintiff to incur actual damages.

COUNT THREE
(*UNJUST ENRICHMENT*)

26. Plaintiff repeats and re-alleges the allegations set forth in Paragraphs 1 through 25 above as if such allegations were set forth at length herein.

27. Atlantic has accepted, used and enjoyed the benefit of labor and materials Plaintiff provided to the Project between July 20, 2010 and November 3, 2011.

28. The reasonable value of the services and materials Plaintiff provided to Atlantic for use on the Project is $1,015.128.82; however, Atlantic has paid Plaintiff only $855,470.95 to date.

29. Atlantic has been unjustly enriched in an amount not less than $159,675.87 by retaining the benefit of labor and materials Plaintiff provided to the Project.

COUNT FOUR
(*TEXAS CONSTRUCTION TRUST FUND STATUTE & ACCOUNTING*)

30. Plaintiff repeats and re-alleges the allegations set forth in Paragraphs 1 through 29 above as if such allegations were set forth at length herein.

31. Plaintiff, in addition to other recoveries it may have, seeks recovery against Atlantic, Defendant Bruce W. Exum, Jr. and Defendant Linda M. Exum under Chapter 162 of the Texas Property Code ("the Trust Fund Act").

32. The Prime Contract and the Subcontract were for the improvement of real property in the State of Texas.

33. The Owner has paid Atlantic in full for the work performed by Plaintiff.

34. The fund paid by the Owner to Atlantic for work performed and materials delivered by Plaintiff on the Project are deemed "trust funds" pursuant to Texas Property Code § 162.001, *et seq*.

35. The Trust Fund Act provides "[a] contractor, subcontractor, or owner or an officer, director, or agent of a contractor . . . who receives trust funds or

who has control or direction of trust funds, is a trustee of the trust funds." Tex. Prop. Code. § 162.002.

36. Defendant Bruce W. Exum, Jr. is, and at all times material to Plaintiffs claims was, the President and Chief Executive Officer of Atlantic and has had control or direction of trust funds.

37. Defendant Linda M. Exum, upon information and belief, is and at all times material to Plaintiff's claims, was the Vice President and an owner of Atlantic. *See* Tex. Prop. Code § 162.002.

38. Defendants Bruce W. Exum, Jr. and Linda M. Exum, in addition to Atlantic, are liable to Plaintiff in their individual capacity.

39. Plaintiff is a beneficiary of trust funds paid by the Owner to Atlantic. Tex. Prop. Code § 162.003.

40. Atlantic, Bruce W. Exum, Jr. and Linda M. Exum breached their fiduciary duties as trustees to Plaintiff by intentionally, knowingly, and with the intent to defraud, retaining, using, disbursing, or otherwise diverting trust funds without fully paying Plaintiff,

41. *Wherefore*, Plaintiff seeks an accounting, together with the recovery of the actual, exemplary, and statutory damages as allowed by the Trust Fund Act, common law and the Subcontractor Agreement for such violations.

COUNT FIVE
(*TEXAS PROMPT PAY ACT*)

42. Plaintiff repeats and re-alleges the allegations set forth in Paragraphs 1 through 41 above as if such allegations were set forth at length herein.

43. Atlantic, pursuant to Texas Government Code § 2251.022, was required to pay Plaintiff not later than the 10th day after the date it received payment from the Owner.

44. Atlantic has received payment in full for the labor and materials provided to the Project by Plaintiff.

45. Atlantic has refused to make payment to Plaintiff for the labor and materials provided to the Project by Plaintiff.

46. As a result of the foregoing, Atlantic violated the provisions of §2251.001, *et seq.*, Texas Government Code, and therefore Plaintiff is entitled to recover interest on the unpaid amount as provided in §2251.025 of the Texas Government Code.

47. *Wherefore*, Plaintiff seeks an accounting, together with the recovery of the actual, exemplary, and statutory damages as allowed by the Trust Fund Act, common law and the Subcontractor Agreement for such violations.

VI. PRAYER FOR RELIEF

WHEREFORE, the United States of America, for the use of J-Crew Management, Inc. demands judgment against defendants, jointly and severally, in the amount of $159,675.87 together with interest, costs, attorneys' fees, exemplary and statutory damages in the maximum amount allowed by law, and such further relief as the Court deems just and proper.

DEMAND FOR JURT TRIAL

Plaintiff hereby demands a jury trial for all triable issues of fact.

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Telephone: (512) 708-1250
Facsimile: (512) 708-0519
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May, 2012, I electronically filed the foregoing with the Clerk of Court via CM/ECF and that all counsel of record have been served via ECF.

/s/ Chad B. Simon

Dated: May 9, 2012

EXHIBIT A

[Logo]

Atlantic Marine Construction Company, Inc.
3465 Chandler Creek Rd.
Virginia Beach, VA 23454
Phone 757-362-0028
Fx 757-362-0024

SUBCONTRACT AGREEMENT

Subcontract No. JCR140004
Fort Hood CDC, Ft. Hood TX

THIS SUBCONTRACT AGREEMENT made as of this day of July, 2010 by and between Atlantic Marine Construction Co., Inc., hereafter referred to as ("AMC"), and JCrew Management, Inc. hereafter referred to as ("Subcontractor"). Whereas AMC has, heretofore, entered into a contract with the Owner, hereinafter referred to as ("the Owner") for the construction of Contract W912DY-08-D-0029 0001.

WHEREAS, AMC has entered into the above noted prime contract ("the Prime Contract") with the above noted owner ("the Owner") for the project that is described above ("the Project").

WHEREAS, the Subcontractor desires to furnish and/or provide a portion of the work and/or materials required by the Prime Contract ("the Subcontract Work") as set forth in this Subcontract Agreement ("the Subcontract"); and

WHEREAS, AMC desires to obtain work and/or materials from the Subcontractor under the terms and conditions of the Subcontract;

NOW, THEREFORE, the parties hereto for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, do hereby agree and covenant as follows:

1. PRIME CONTRACT: The Prime Contract together with all documents described therein and appurtenant thereto, are incorporated herein by reference and made a part of this Subcontract, and are available to the Subcontractor at the office of AMC. The Subcontractor assumes the same obligations to AMC under this Subcontract that AMC assumes to the Owner under the Prime Contract. The Subcontractor shall comply with all conditions of the Prime Contract and the documents made a part thereof insofar as they apply to the Subcontract Work described in Paragraph 3 of this Subcontract. The Subcontractor also acknowledges that it has made a site visit to review conditions which may relate to the performance of the Subcontract Work, and that it has reviewed the Prime Contract, the Drawings and Specifications as they relate to its work and all other work which may interface with the Subcontract Work. If the Owner of the Project is a governmental entity, applicable laws, ordinances, and regulations may also govern this Subcontract, including without limitation to the Federal Acquisition Regulations and the Department of Defense Supplement to the Federal Acquisition Regulations. Because changes to such law, ordinances and regulations may be issued at any time and particular agencies may issue supplemental regulations, current provisions and the individual project specifications must be consulted.

2. SUBCONTRCT DOCUMENTS: The Subcontract documents consist of this Subcontract Agreement, the Prime Contract, the Drawings, the Specifications, and all addenda issued prior to and all Modifications issued after execution of the Subcontract to any of these documents. In the event of a discrepancy among any of the Subcontract Documents, the following shall he the order of precedence, with the document taking precedent listed first:

    i. The Subcontract Agreement

    ii. The Specifications

    iii. The Drawings

    iv. The Prime Contract together with Addenda and Modifications

    However, should the Prime Contract contain an Order of Precedence Clause, such clause shall govern, except that the terms of this Subcontract Agreement shall govern over all other documents.

3. SCOPE OF SUBCONTRACT WORK: The Subcontractor shall, for and in the stead of AMC, perform all work as follows:

This Scope of Work (SOW) describes the performance requirements to supply and install all necessary components as required by design and as defined below. The project consists of the following activities (summarized by specification section) in brief but is not limited to the following activities:

042113	UNIT MASONRY
061053	MISCELLANEOUS ROUGH CARPENTRY
064023	INTERIOR ARCHITECTURAL WOODWORK
072100	THERMAL INSULATION
072413	POLYMER-BASED EXTERIOR INSULATION & FINISH SYSTEM (EIFS)
072713	MODIFIED BITUMINOUS SHEET AIR BARRIERS
072726	FLUID APPLIED MEMBRANE AIR BARRIES
076200	SHEET METAL FLASHING AND TRIM
078413	PENETRATION FIRE STOPPING
078446	FIRE RESISTIVE JOINT SYSTEMS
079200	JOINT SEALANTS
081113	HOLLOW METAL DOORS AND FRAMES
081416	FLUSH WOOD DOORS
083323	OVERHEAD COILING DOORS
087100	DOOR HARDWARE
092216	NON-STRUCTURAL METAL FRAMING
092900	GYPSUM BOARD
093000	TILING
095113	ACOUSTICAL PANEL CEILINGS

096516	RESILIENT BASE AND ACCESSORIES
096516	RESILIENT SHEET FLOORING
096519	RESILIENT TILE FLOORING
096566	RESILIENT ATHLETIC FLOORING
096813	TILE CARPETING
097723	FABRIC WRAPPED PANELS
099113	EXTERIOR PAINTING
099123	INTERIOR PAINTING
099600	HIGH PERFORMANCE COATINGS
102113	TOILET COMPARTMENT
102213	WIRE MESH PARTITIONS
102600	WALL AND DOOR PROTECTION
102800	TOILET, BATH, AND LAUNDRY ACCESSORIES
105113	METAL LOCKERS
116653	GYMNASIUM DIVIDERS
122113	HORIZONTAL LOUVER BLINDS
124813	ENTRANCE FLOOR MATS AND FRAMES

The above summaries are not intended to be an all inclusive or exhaustive list. The subcontractor will be expected to provide and install components for this facility as required by the provided drawings and design specifications.

4. SUBCONTRACT AMOUNT & PAYMENT

a) for the performance of the work described in Paragraph 3 of this Subcontract Agreement.

AMC shall pay the Subcontractor the sum of Nine Hundred Ninety Six Thousand Five Hundred Ninety Two Dollars and 12 cents, ($996592.12) subject to additions and deductions as herein provided. The contract sum includes all Federal State, County, Municipal and other Taxes imposed by law. Where the law requires any such tax to be stated and charged separately, the total of all taxes is included in the Contract Sum indicated above.

b) Progress payments subject to all applicable provisions of the Prime Contract shall be made within Ten (10) days after receipt by AMC of payment from the Owner, less any deductions for improperly or untimely performed work or for work performed by AMC on the Subcontractor's account; provided, however, that if the Owner is a governmental entity and progress payments are required to be made earlier by law, then progress payments will be made to the Subcontractor upon receipt by AMC within the time limits prescribed by law if earlier than Ten (10) days.

c) The Subcontractor may be required as a condition precedent to any payment to furnish evidence satisfactory to AMC that all payrolls, material bills, and other indebtedness applicable to the Subcontractor's Work have been paid. In the even AMC has reason to believe that labor, material or other obligations incurred in the performance of the Subcontractor's Work are not being paid, AMC may take any steps deemed necessary

to assure that any progress payment shall be utilized to pay such obligations. AMC shall also have the right to offset any amounts due to Subcontractor under any other agreement with AMC to pay such obligations.

d) Retainage: There shall be withheld from payments to the subcontractor a retainage percentage equal to that held by the Owner from AMC's payments.

e) Progress payments shall constitute a waiver of all claims by the Subcontractor relating to the Subcontractor's work which is the subject of each progress payment, but shall in no way relieve the Subcontractor of liability for the obligation to warrant or guarantee Subcontractor's Work, or for faulty or defective work, or for incomplete or unperformed work.

f) The Subcontractor understands, acknowledges and agrees that progress payments to it shall not become due, unless and until, and as a resolute prerequisite, AMC has actually received payment from the Owner for the Subcontractor's work.

5. FINAL PAYMENT:

a) Upon acceptance of the Subcontractor's Work by the Owner and AMC, and upon the Subcontractor furnishing evidence of fulfillment of the Subcontractor's obligations as agreed herein, AMC shall forward the Subcontractor's application for final payment.

b) Before AMC shall be required to forward the Subcontractor's application for final pay-

ment to the Owner, the Subcontractor shall submit to AMC:

i. An affidavit that all payrolls, bills for materials and equipment, and other indebtedness connected with the Subcontractor's Work for which the Owner or AMC or AMC's surety might in any way be liable, have been paid or otherwise satisfied

ii. Consent of surety to final payment, if required

iii. Satisfaction of required close-out procedures; and,

iv. Other substantiation and certification as required by AMC, including but not limited to receipts, releases, and waivers of claims to the extent and in such form as may be designated by AMC or the Owner

c) Final Payment shall constitute a waiver of all claims by the Subcontractor relating to the Subcontractor's Work but shall in no way relieve the Subcontractor of liability for the obligation to warrant or guarantee Subcontractor's Work, or for any faulty or defective work appearing after Final Payment.

d) The Subcontractor understands, acknowledges and agrees that final payment to it shall not become due unless and until, as a resolute prerequisite, AMC has actually received final payment from the Owner for the Subcontractor's work.

6. PROJECT SCHEDULE:

Time Is Of The Essence On this Subcontract: The subcontractor agrees to promptly begin work as soon as notified by AMC and shall employ a work force sufficient to complete the work to by performed under this Agreement no later than the date 7/15/2010 herein referred to as the "Performance Period"), subject to adjustments authorized by AMC. The progress of the Work will be periodically evaluated to determine conformance with AMC's schedule as amended, to reflect the actual progress of the project. If evaluation reveals the Work to be behind schedule, the Subcontractor shall arrange by whatever means necessary to make-up the lost time as directed by AMC, including overtime to be performed at the Subcontractor's expense.

a) If the Subcontractor wishes to make a claim for increase in the Subcontract Performance Period, it shall give AMC written notice thereof within the time period required by the Prime Contract, whichever is shorter, This notice shall be given by the Subcontractor before proceeding to execute the work, except in an emergency endangering life or property. No claim for an increase in the Performance Period shall be valid unless so made, and any changes in the Performance Period resulting from such claim shall not be valid unless authorized by a written Change Order.

7. If the process of the Subcontract Work is substantially delayed without fault or responsibility of the Subcontractor, then the time for the

Subcontract Work shall be extended to the extent obtained by AMC under the Prime Contract and the Progress Schedule shall be revised accordingly. AMC shall not be liable to the Subcontractor for any damages or additional compensation as a consequence of delays unless AMC has first recovered the same on behalf of the Subcontractor from the Owner. It is understood and agreed by the Subcontractor that, apart from such recovery from the Owner, the Subcontractor's sole and exclusive remedy for delay shall be an extension in the time for performance of the Subcontract Work.

8. SUBCONTRACT EXECUTION: The original of the Subcontract Agreement must be signed and returned to AMC within fifteen (15) days of the date appearing above. AMC reserves the right to unilaterally withdraw this Agreement if it has not been completely executed and returned within fifteen (15) days of the date appearing above. However, if this Agreement is not withdrawn by AMC, and if the Subcontractor does not return an executed copy of this Agreement or written exception to the terms contained herein within thirty (30) days from the date appearing above, then this Agreement will become the contract between AMC and the Subcontractor. In such event, AMC will require full performance there of

9. SUBMITTALS: All required submittals (shop drawings, product data, samples, & etc.) shall be forwarded to AMC for review no later than 7/27/2010 in order to not delay the Work of the activities of AMC or other subcontractors. Should the subcontractor present submittals that

do not conform to the contract documents; the subcontractor will be charged all costs associated with the re-review and re-transmittal of the submittals. All submittals must contain any and all applicable SMDS forms. A total of six (6) submittal package copies shall be furnished to AMC

10. PERMITS AND LICENSES: The Subcontractor shall inform itself in detail of all licensing and tax requirements pertaining to the Prime Contract, and shall comply with and enforce those applicable to the work hereunder. Unless otherwise stated in the Subcontract Documents the Subcontractor shall secure and pay for all permits and governmental fees, taxed licenses and inspections necessary for the proper execution and completion of the work and/or which are legally required.

11. CHANGES IN THE WORK:

    a) The subcontractor may be ordered in writing by AMC's Project manager or a AMC corporate officer, without invalidating the Subcontract, to make changes in the Work within the general scope of this Subcontract consisting of additions deletions or other revisions, including, but not limited to those required by Modifications to the Prime Contract issued subsequent to this Agreement. AMC reserves the right to direct changes, additions and/or deletions in the Work, as it may deem necessary. The value of the work to be changed, added or deleted shall be stated in the written order and shall be added to or deducted from the Contract Sum, and adjustments made to the Performance

Period. No change from the Work specified in this Agreement will be permitted, or paid for, unless the additional or deductive costs of the change is first agreed upon and a written change order is executed by the Subcontractor and AMC's Authorized Representative.

b) Should AMC and the Subcontractor be unable to agree as to the value of the work to be changed, added, or deleted, the Subcontractor shall promptly proceed with the work under the unilateral written order of AMC. The determination of the value of the changed work shall be determined pursuant to Paragraph eleven (11) herein.

12. CLAIMS ABND DISPUTES

a) With respect to any dispute between the Subcontractor and AMC for which the Owner is or may be liable, the Subcontractor will prepare its claim and will timely present to AMC for submission to the Owner under the applicable disputes resolution provision of the Prime Contract. AMC will cooperate with the Subcontractor in presenting such claim to the Owner and will pay to the Subcontractor (subject to any applicable setoff) any amounts recovered for the Subcontractor on such claim. AMC shall not have any obligation to submit a claim by the Subcontractor that AMC does not in good faith believe meets all applicable requirements pertaining to submission of claims to the Owner. The Subcontractor agrees that it will bear all costs, including legal fees, necessary to pursue such a claim against the Owner and that

this remedy shall be the Subcontractor's sole exclusive remedy in lieu of any claim directly against AMC or its bonding company pursuant to the any other law or procedure, regardless of the outcome of the claim.

b) The Subcontractor agrees that all other disputes not included in subparagraph (A) above, shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division. The Parties hereto expressly consent to the jurisdiction and venue of said courts.

11. CLAIMS AND DISPUTES (cont)

c) At sole discretion of AMC, claims included in subparagraphs (a) or (b), above, may be arbitrated or decided by some other means of alternative dispute resolution procedure. If AMC determines that resolution of any dispute between the Subcontract and AMC shall be made in such manner, litigation pursuant to subparagraph (b), above, shall not be permitted. AMC will be entitled to recover all costs incurred in any litigation or arbitration between parties, including but not limited to, its attorney fees.

d) No litigation, arbitration or other dispute resolution procedure concerning a dispute arising under or relating to the Subcontractor may be commenced by the Subcontractor more than ONE (1) YEAR after completion of the Subcontract Work by the Subcontractor. In any event, the Subcontractor shall

proceed diligently with the Subcontract Work pending resolution of any dispute

13. WARRANTY: The Subcontractor warrants that all workmanship, materials, and equipment furnished under this Subcontract will be of good quality, free from faults and defects, and in conformance with the Subcontract for the term required in the Prime Contract. If no such provisions exist, then the Subcontractor shall warrant its work aforesaid for a period of one (1) year from the final acceptance of the completed Prime Contract work by the Owner. The Subcontractor further warrants that any design or engineering work performed by it is competent and in keeping with the accepted industry and trade standards for such design or engineering work and the Subcontractor further agrees to hold AMC harmless from any loss, claims, demands, suits, actions or expenses resulting from the Subcontractor's breach or from a claimed breached of said warranty.

14. DELAY DAMAGES: It is crucial that this project finishes within the Performance Period and contract time allotted. Should subcontractor delay the project to the extent that the critical path is affected and the project completion extends beyond the allowable completion date due to the actions or in-actions of the subcontractor, AMC shall have the right to apportion and assess any delay damages suffered by AMC, including but not limited to, any damages imposed on AMC by the Owner, liquidated or otherwise, on a proportion basis, depending on how much the subcontractor's actions or in-actions delayed the project. The subcontractor

shall only be responsible for the impacts caused directly by the subcontractor's actions or inactions.

15. SAFETY: The Subcontractor shall take all reasonable safety precautions with respect to the performance of its work and shall comply with all safety regulations initiated by AMC and with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority for the safety of persons or property. Further, the Subcontractor shall comply with the safety and health standards of the Occupational Safety and Health Act of 1970, the safety and health standards of the Army Corps of Engineers Safety and Health Requirements Manual No. EM 385-1-1 and all additions and modifications thereafter. The Subcontractor shall hold AMC harmless for any violation by the Subcontractor's workers, employees or agents of any law or regulation, and shall reimburse AMC for any fines, damages, or expenses of any kind incurred by reason of the Subcontractor's failure to comply with such law or regulation.

16. INDEMNIFICATION

    a) To the fullest extent permitted by law, the Subcontractor shall defend, indemnify and hold harmless the Owner, AMC, the Architect, and project consultants from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work under this Subcontract, but only to the extent caused in whole or in part by negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-

contractor(s), anyone directly or indirectly employed by them or anyone for whose acts may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this paragraph.

b) The indemnification obligation under this provision shall not be limited by a limitation on amount or type of damage, compensation or benefits payable by or for the Subcontractor or the Subcontractor's Sub-contractors under worker's or workmen's compensation acts, disability benefit acts or other employee benefits acts

17. INSURANCE: The Subcontractor agrees to obtain, pay for, and maintain at least the following insurance coverage: Commercial General Liability, Workmen's Compensation and employers' Liability, and Automobile Liability Insurance. The specific coverage and minimum amounts shall be as required of AMC by the Prime Contract or as otherwise specified herein. Prior to commencing work on-site, the Subcontractor shall deliver *Certificate of Insurance* to AMC providing for the minimum coverage required by the Contract Documents and a Thirty (30) day advance written notice to AMC prior to cancellation or alteration of any policy. Additionally all Certificates of Insurance must list AMC as an additional insured. A completed

CG2010 must be supplied as evidence of endorsement.

18. BONDS: At the option of AMC, when the Subcontract is $25,000, or greater, the Subcontractor agrees that it shall provide AMC a Performance bond equal to 100% of the Subcontract Sum and a Labor and Material Payment bond equal to 50% of the Subcontract Sum, in favor of AMC, on standard industry accepted bond forms as security for faithful performance of the work and payment of all labor and material used in the prosecution of the Subcontractor's work, The surety on such bonds shall be duly authorized to do business in the Commonwealth of Virginia and shall be subject to approval by AMC.

19. SUBCONTRACTOR'S REMEDIES: If AMC does not pay the Subcontractor through no fault of the Subcontractor, within seven (7) days from the time payment should be made as provided in paragraph Four (4), the Subcontractor may, without prejudice to any other remedy he may have, upon seven (7) additional days written notice to AMC, stop work until payment of the amount owed has been received. The Subcontractor shall make all claims in writing to AMC for additional cost, extensions of time, or delays, within THREE (3) CALENDAR DAYS after the occurrence of event giving rise to the claim or in sufficient time to allow AMC to process the Subcontractor's claim with the Owner pursuant to the terms of the Prime Contract, whichever is shorter. Written notice of such claims is a condition precedent to the Subcontract's recovery.

20. AMC'S REMEDIES: Should the Subcontractor fail to provide a sufficient labor force or materi-

als of the proper quality and quantity, or fail in any material respect to prosecute the Work as directed by AMC, AMC shall have the right after 72 hour written notice to the Subcontractor, delivered by facsimile, hand, or U.S. Mail to the last know business address to either perform the work itself, and charge the costs to the Subcontractor, including AMC's overhead and profit, or to terminate the employment of the Subcontractor for all or any portion of the work and complete the work by whatever means AMC deems expedient. All re-procurement costs, including reasonable legal fees, shall be charged to the Subcontractor's account. Subcontractor shall remain fully responsible for all warranties and guarantees required by this Agreement of the Prime Contract Documents

21. TERMINATION FOR CONVENIENCE:

a) This Subcontractor may also be terminated for convenience by AMC, in whole or in part:

i. Whenever for any reason AMC shall determine that such termination is in the best interest of AMC

ii. Should the Prime Contract be terminated

b) If the Subcontract is terminated for convenience, the Subcontractor shall only be entitled to receive as payment the difference between an amount equal to the proportion of the Subcontract Amount representing the percent of the Work completed by the Subcontractor and accepted, and the total of all amounts previously paid to the Subcontractor, and the Subcontractor shall not be

entitled to receive payment for incidental or consequential damages, or for lost profits on unperformed work.

c) If the Subcontractor is terminated because the Prime Contract has been terminated the rights of the Subcontractor with regard to payment and damages shall equal the proportionate share of any payment or damages recovered by AMC pursuant to the terms of the Prime Contract that AMC reasonably determines are properly apportionable to the Subcontractor

22. COMPLIANCE WITH LAW: The Subcontractor shall give all notices and comply with all laws, ordinances, rules or regulations and lawful orders of any public authority bearing on the performance of the Subcontract Work.

23. CLEAN UP: The Subcontractor shall clean the premises daily. If the Subcontractor fails to perform daily cleanup, AMC shall complete the cleanup, subject to (24) hours notice, and deduct the cost from sums due the Subcontractor.

24. LABOR & SUPERVISION: The Subcontractor shall maintain on-site at all times during performance of the Work a qualified person responsible for the Work and who is authorized to act on its behalf. All labor employed on the Work by the Subcontractor, including supervisory personnel, shall be satisfactory to AMC.

25. HEADINGS: Heading used throughout this Subcontract are for the convenience of the parties, and are not intended to restrict or in any way affect the interpretation of this Subcontract.

26. SEVERABILITY: The invalidity of any provision of this Subcontract as determined by a court of competent jurisdiction, shall in no way affect the validity of any other provision hereof.

27. NOTICE: All notices hereunder shall be given in writing by hand, by commercial courier, or by registered or certified mail, return receipt requested, postage prepaid and shall be deemed given as of the date of hand-delivery or the date of postal or commercial courier receipt witnessing the dispatch of such notice, All notices shall be delivered or sent to the respective parties at the respective addresses set forth above or to such different addresses as the respective parties may from time to time designate by notice properly given hereunder.

28. ASSIGNMENT: Subcontractor may not assign, pledge or otherwise transfer any payments, rights or interest in or to the Subcontract or the Subcontract Work without having first obtained the written consent of AMC, which consent may be withheld at the sole discretion of AMC.

29. NO WAIVERS: The failure by AMC to insist upon the strict performance of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. No covenant, term or condition of this Subcontract shall be deemed to have been waived by AMC, unless such waiver shall be in writing and signed by AMC.

30. ENTIRE AGREEMENT: This Subcontract and any document incorporated or referenced herein

contain and embrace the entire agreement between the parties hereto, and neither it nor any part of it may be changed, altered, modified, limited or extended, orally or by any agreement between the parties, unless such agreement is expressed in writing, signed and acknowledged by AMC and the Subcontractor, or their successors and assigns.

31. ADMINISTRATIVE REQUIREMENTS: The Subcontractor agrees to promptly comply with all administrative items required by the contract documents including, but not limited to: Certified Payroll Reports, Submittals, SF1413 Statement & Acknowledgment Form, Certificate of Insurance, Schedule of Values, List of Key Personnel, and Certificate of Release.

32. EXHIBITS: The following Exhibits have been attached hereto and are made a part hereof this agreement:

Exhibit A) Representations, Certifications And Other Statements, 2pgs

Exhibit B) Health and Safety Requirements, 1pg

Exhibit C) Labor Standards, Wage Rates, And Certified Payroll Procedures, 2pgs

Exhibit D) Subcontractor Partial Lien Waiver, 1pg

Exhibit E) Final Lien Waiver, 1pg

Exhibit F) Schedule of Values, 2pgs

Exhibit G) General Wage Decision

Exhibit H) IRS Form W-9, 4pg

Exhibit J) SF1413 Statement &
Acknowledgement Form, 1pg

Exhibit K) Form 1185

WHEREFORE, the parties hereto have placed their hands and seals.

BY THE CONTRACTOR

ATLANTIC MARINE CONSTRUCTION CO., INC.

Signature: _____

Print: _____

Title: _____

Date: _____

BY THE SUBCONTRACTOR

JCREW MANAGEMENT, INC.

Signature: [Illegible]

Print: [Illegible]

Title: President

Date: 7/29/10

Job Schedule

Contract number: W912DY-08-D-0029-001 Job Superintendant: Pick Customer name: COE

	J	F	F	F	F	M	M	M	M	Production date (Elapsed time by week)																				
Event	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30
EFIS																														
Masonry																														
Drywall																														
Paint																														
HVAC (Rough-in)																														
Sprinkler																														
Electrical Trim																														
Fire Alarm																														
Down spouts / Soffit																														
Paving					Pending Submittal and seepage																									
Final Grade																														
Sidewalks																														
Site Lighting																														
Paint and Striping	See Paving																													
& Signage																														
Cabinets / Trim																														
Flooring																														
Landscaping																														
Plumbing / Final																														
HVAC Final																														
Lay in Ceiling																														
Kitchen																														
Store Fronts / Doors																														
Ceramic Tile																														
Set Plumb. Fixtures																														

Case 1:12-cv-00228-LY Document 18 Filed 05/09/12 Page 20 of 20

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed 05/23/12]

Civil Action No. 1:12-cv-228

UNITED STATES OF AMERICA, FOR THE USE OF J-CREW MANAGEMENT, INC.,
Plaintiff,
v.
ATLANTIC MARINE CONSTRUCTION COMPANY, INC., BRUCE W. EXUM, JR., AND LINDA M. EXUM,
Defendants.

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT OR, ALTERNATIVELY, TRANSFER VENUE

Respectfully submitted,

W. Scott Hastings
State Bar No. 24002241
Christopher M. Boeck
State Bar No. 24050301
LOCKE LORD LLP
2200 Ross Avenue, Suite 2200
Dallas TX 75201-6776
(214) 740-8000 (Telephone)
(214) 756-8800 (Facsimile)

Attorneys For Defendants Atlantic Marine Construction Company, Inc., Bruce Exum, Jr., And Linda M. Exum

TO THE HONORABLE JUDGE YEAKEL:

Pursuant to Federal Rules of Civil Procedure 12(b)(3) and 12(b)(6), 28 U.S.C § 1404(a), and 28 U.S.C. § 1406(a), Defendants Atlantic Marine Construction Company, Inc. ("AMC"), Bruce W. Exum, Jr. ("Mr. Exum"), and Linda M. Exum ("Mrs. Exum") (collectively, "Defendants") file their *Motion to Dismiss Plaintiff's First Amended Complaint or, Alternatively, Transfer Venue*, and Brief in Support, and respectfully state as follows:

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff's[1] First Amended Complaint attempts to stretch a breach of contract claim into five separate causes of action, all of which are based upon the same contractual theory and identical underlying facts. Defendants respectfully request the Court to dismiss Plaintiff's statutory claims under the Texas Construction Trust Fund Act and the Texas Prompt Pay Act. The construction project at issue occurred on federal land ceded to the United States in 1950, which is no longer part of the State of Texas.[2] *Adam v. Calvert*, 396 S.W.2d 948, 949-51 (Tex. 1965) (discussing cession of Ft. Hood). The Texas Construction Trust Fund Act, however, expressly applies only to construction contracts for the improvement of specific real property *in this State*. Tex. Prop. Code § 162.001. Similarly, the Texas Prompt Pay Act applies only

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[1] Plaintiff improperly brings this lawsuit in the name of the United States of America though it no longer has a basis for doing so after having voluntarily dismissed its claims under the Miller Act.

[2] Plaintiff's First Amended Complaint, ¶ 7 (stating that the construction project was located at Ft. Hood).

to payments by a Texas state agency or political subdivision of the State of Texas. Tex. Govt. Code §§ 2251.001(8) and 2251.022(a). The payments at issue in this litigation, however, were made by the United States Government, U.S. Army Corp of Engineers.[3] Consequently, Plaintiff has failed to state a cause of action under either of these Texas statutes.

Defendants also request the Court to Dismiss this action, entirely, pursuant to Fed. R. Civ. P. 12(b)(3) or, alternatively, transfer the action to the United States District Court for the Eastern District of Virginia, Norfolk Division. The Subcontract Agreement underlying Plaintiff's claims includes a forum selection clause that mandates a Virginia forum.[4] In *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972), the Supreme Court recognized the strong federal presumption favoring enforcement of contractual choice of forum provisions. In the modern-day world of contracts involving parties from multiple locations, forum selection clauses allow for certainty among the parties regarding where and/or how their contracts will be administered and their disputes will be resolved. Here, the Subcontract Agreement in dispute was agreed to by parties from Virginia and Texas, regarding work to be performed in a federal enclave, under a contract issued by the Army Corps of Engineers in Alabama, with payments funded from Tennessee. That Subcontract Agreement calls for a Virginia forum and should be enforced as written.

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[3] *Id.*

[4] Exhibit A to Plaintiff's First Amended Complaint, ¶ 12(b). The Subcontract also contains an arbitration clause at Paragraph 12(c). Defendants expressly reserve the right to move to compel Plaintiff to arbitrate each and all of the claims alleged in Plaintiff's First Amended Complaint.

II. STATEMENT OF FACTS

A. Summary of background facts.

In April of 2009, the United States Corp. of Engineers contracted with AMC, a Virginia corporation with its principal place of business in Virginia Beach, Virginia (the "Prime Contract"), for the construction of a child development center located in Ft. Hood.[5] Ft. Hood is a federal enclave located near Killeen, Texas. *See Adams v. Calvert*, 396 S.W.2d 948, 949-52 (Tex. 1965). AMC thereafter entered into a Subcontract Agreement with Plaintiff (the "Subcontract") for the provision of construction labor and materials in connection with the Prime Contract.[6] Each of Plaintiff's claims is premised upon the single allegation that Defendants failed to pay Plaintiff $159,675.87 owed for labor and materials that Plaintiff purportedly provided as a subcontractor of Defendant AMC. Each of the claims is therefore dependent upon Plaintiff's status as a subcontractor of AMC, a relationship that is governed by the Subcontract Agreement.

B. The forum selection clause in the Subcontract Agreement.

The Subcontract Agreement, attached as Exhibit A to Plaintiff's First Amended Complaint, contains a mandatory forum selection clause at Paragraph 12(b). The preceding subparagraph 12(a) sets forth the procedure for dealing with the subcontractor's disputes for which the United States Government might be liable, and includes protocol for submitting such claims to the Government pursuant to the

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[5] First Amended Complaint, ¶¶ 7-8.

[6] *Id.* at ¶ 9 and Exhibit A to the First Amended Complaint.

Prime Contract. Subparagraph 12(b), thereafter, states:

> The Subcontractor [Plaintiff] agrees that all other disputes not included in subparagraph (a) above, shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division. The Parties hereto expressly consent to the jurisdiction and venue of said courts.[7]

Because Plaintiff has not alleged any claims involving conduct of the Government, and because all of Plaintiff's claims relate to the subject of the Subcontract Agreement, the forum selection clause is applicable to all of Plaintiff's claims.

C. Plaintiff's claims are tied to the agreed forum in Virginia.

All of Plaintiff's claims relate to the same purported conduct: AMC's failure to pay Plaintiff money allegedly owed under the Subcontract Agreement. In addition to the fact that the Subcontract Agreement contains the parties' agreement to litigate Plaintiff's claims in Virginia, the claims themselves are tied to that state. AMC's principal place of business is located in Virginia Beach, Virginia, less than twenty miles from Norfolk.[8] AMC handles all of its accounting from its corporate headquarters there in Virginia Beach, Virginia, and the receipt and evaluation of

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[7] Subcontract, attached as Exhibit A to Plaintiff's First Amended Complaint, ¶ 12(b).

[8] Exhibit A to this Motion to Dismiss Plaintiff's Firs Amended Complaint or, Alternatively, to Transfer Venue ("Exhibit A"), Affidavit of Bruce Exum, Jr., ¶ 2.

subcontract proposals, subcontract selection, procurement and execution are conducted at its Virginia Beach office.[9] All invoices, bills, accountings, records, and other documents relating to payments—or lack of payments—to J-Crew Management, Inc. are located in Virginia Beach.[10] In addition, AMC's project management team, with the exception of those personnel required by contract to be onsite, who presided over and managed the subject project are located in Virginia.[11] AMC does not have any offices, mailing addresses, or telephone numbers in Texas.[12] AMC has never maintained any bank account in Texas and all construction project funds—including the funds sought by J-Crew Management, Inc. in this lawsuit—are maintained and paid out of AMC's Virginia bank accounts.[13]

III. MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM

A. Plaintiff's Count Four fails to state a claim under the Texas Construction Trust Fund Act because the construction project at issue occurred outside the State of Texas.

Count Four of Plaintiff's First Amended Complaint attempts to state a claim under the Texas Construction Trust Fund Act, Chapter 162 of the Texas Property Code. This Act creates a cause of action for misapplication of "trust funds," and expressly defines "trust funds" as "construction payments . . . made to a

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

contractor . . . under a construction contract for the improvement of specific real property *in this state*." Tex. Prop. Code § 162.001(a) (emphasis added). It is undisputed that the construction project at issue in this litigation took place at Fort Hood, a federal enclave that is not part of the jurisdiction of the State of Texas.[14]

In 1950, the Governor of the State of Texas, acting on behalf of the State, executed and delivered a deed of cession to the United States of America, ceding exclusive jurisdiction over certain lands to the federal government, including those in the military reservation known as Fort Hood. *Adam v. Calvert*, 396 S.W.2d 948, 949-51 (Tex. 1965). When consenting to cede land to the United States Government, a state may qualify its consent with reservations of jurisdiction so long as they are not inconsistent with the federal governmental uses. *Id.* at 950. The extent of jurisdiction reserved to the State is a matter for negotiation by the Governor and is settled and concluded by his deed of cession. *Id.* The only jurisdiction reserved by the State of Texas in the deed of cession of Fort Hood was a reservation of concurrent jurisdiction over the lands for the purpose of executing civil and criminal process. *Id.* at 949. Consequently, all other matters, including the right to legislate and control the construction and improvement of real property within the ceded boundaries of Fort Hood, fall outside the jurisdiction of the State. In that regard, Fort Hood is now an exclusively federal jurisdiction subject to federal law.

For these reasons, Plaintiff has failed to plead a claim arising under the Texas Construction Trust

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[14] First Amended Complaint, ¶ 7.

Fund Act because Plaintiff has failed to plead the existence of a construction contract for the improvement of specific real property in this state. Tex. Prop. Code § 162.001(a). No amendment of Plaintiff's Amended Complaint could correct this error because no such contract exists between the Parties. Count Four of Plaintiff's First Amended Complaint should therefore be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

B. Plaintiff's Count Five fails to state a claim under the Texas Prompt Pay Act because the payments to Defendants came from the United States Government.

Count Five of Plaintiff's First Amended Complaint attempts to plead a claim under the Texas Prompt Pay Act, Texas Government Code § 2251.001, *et seq.* Specifically, Plaintiff pleads that Defendant AMC was required to make certain payments to Plaintiff pursuant to Texas Government Code § 2251.022. This provision states, "[a] vendor who receives a payment *from a governmental entity* shall pay a subcontractor the appropriate share of the payment not later than the 10th day after the date the vendor receives the payment." (Emphasis added.) The term "governmental entity" is defined in the Act as "a state agency or political subdivision of this state." Tex. Govt. Code § 2251.001(3). "Statutes must be construed as written, and legislative intent determined, if possible, from their express terms." *Univ. of Tex. Health Sci. Ctr. at Houston v. Gutierrez*, 237 S.W.3d 869, 873 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). "All words used and omitted are presumed used and omitted purposefully." *Id.*

It is undisputed that the owner of the project at issue was the United States Government, U.S. Army

Corps of Engineers, and thus the payments at issue came from the federal government, not a state agency or political subdivision of Texas.[15] Plaintiff has therefore failed to plead a cause of action under the Texas Prompt Pay Act and Count Five of Plaintiff's First Amended Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

IV. MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO TRANSFER PURSUANT TO RULE 12(b)(3) AND 28 U.S.C. § 1406

A. A motion to dismiss under Rule 12(b)(3) and 28 U.S.C. § 1406 is an appropriate means to enforce a forum selection clause.

District Courts have the authority to dismiss or transfer actions for improper venue pursuant to 28 U.S.C. § 1406(a), which provides:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Similarly, Federal Rule of Civil Procedure 12(b)(3) authorizes a defendant to move to dismiss claims for improper venue. FED. R. CIV. P. 12(b)(3); *see also* FED. R. CIV. P. 41(b). In *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902 (5th Cir.), *cert. denied*, 126 S. Ct. 365 (2005), the Fifth Circuit squarely addressed the issue and held that Rule 12(b)(3) is a "proper method for seeking dismissal based on a forum selection clause . . . ."

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[15] First Amended Complaint, ¶ 7.

B. Forum selection clauses are enforceable unless unfair or unreasonable.

A contractual forum-selection provision is prima facie valid and enforceable, unless the opposing party shows that enforcement would be unreasonable. *See Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 299 (5th Cir. 2004). This Court has recognized and applied the Fifth Circuit's "unreasonableness" test, which was first articulated in the seminal Supreme Court decision of *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 9-11 (1972). *See Dominguez v. The Finish Line, Inc.*, 439 F. Supp. 2d 688, 690 n.1 (W.D. Tex. 2006) (Yeakel, J.). The party resisting the enforcement of a forum selection clause bears a "heavy burden of proof" and can establish the unreasonableness of the clause *only* by showing that: (1) the incorporation of the clause into the agreement was the result of fraud or overreaching; (2) the party seeking to escape enforcement will for all practical purposes be deprived of its day in court because of grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state. *Id.*; *Haynsworth v. The Corporation*, 121 F.3d 956, 963 (5th Cir. 1997); *International Software Sys., Inc. v. Amplicon*, 77 F.3d 112, 115 (5th Cir. 1996).

C. The Court should enforce the parties' forum selection clause and dismiss Plaintiff's First Amended Complaint.

The Subcontract's forum selection clause is entirely fair and reasonable given Defendants' residence in Virginia and the fact that both parties negotiating the Subcontract were sophisticated business entities.

Plaintiff cannot argue that the Subcontract's venue clause was overreaching or fraudulent, or that prosecuting its claims in Virginia would have the practical consequence of depriving it of its day in court. Plaintiff has asserted multiple variations of a basic breach of contract claim, which Plaintiff may pursue in Virginia state or federal court. There is no fundamental unfairness to Virginia's law, and no contravention of a "strong public policy" of Texas. *See Haynsworth*, 121 F.3d at 963. Consequently, the Court should enforce the parties' forum selection clause and dismiss Plaintiff's First Amended Complaint for improper venue.

V. IN THE ALTERNATIVE, MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404

A. Based on the applicable forum selection clause, Plaintiff has the burden of proof going forward.

The forum selection provision is a "significant factor that figures centrally in the district court's [1404(a)] calculus." *Stewart Organization, Inc. v. Ricoh*, 487 U.S. 22, 29 (1988); *Azadi v. Berry Network, Inc.*, 858 F. Supp. 83, 84 (E.D. Tex. 1994). Within the framework of determining a Section 1404(a) motion, "a forum selection clause is treated as a manifestation of the parties' preferences as to a convenient forum." *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995). Further, protection of the legitimate expectations of the parties and furtherance of vital interests of the justice system counsel that forum selection provisions be given "controlling weight in all but the most exceptional cases." *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring); *accord Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 220 n.16 (5th Cir. 1998).

When the parties have entered into a contract containing a valid, reasonable choice of forum provision, the burden of persuasion is altered and the opponent bears the burden of persuading the court that the contractual forum is sufficiently inconvenient to justify retention of the dispute. *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989); *Jumara*, 55 F.3d at 880 (plaintiff "bear[s] the burden of demonstrating why [it] should not be bound by [its] contractual choice of forum"). Importantly, this placement of the burden is substantially different than in a Section 1404(a) motion which does not involve a forum selection provision. *Texas Source Group, Inc. v. CCH, Inc.*, 967 F.Supp. 234, 238 (S.D. Tex. 1997) (plaintiff bears a "heavy burden").

B. Application of Section 1404(a).

Generally, the test in determining whether a motion to transfer venue under Section 1404(a) should be granted is: (1) whether the defendant is subject to the jurisdiction of the proposed forum; (2) whether venue is proper in the proposed forum; and (3) whether the transfer will enhance the convenience of the parties and the witnesses and is in the interest of justice. *See Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962); *see also* 28 U.S.C. §1404(a).

1. Defendants are subject to the jurisdiction of the courts in Virginia.

A district court may transfer an action "to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). In the case at hand, Defendants AMC, Bruce Exum, Jr., and Linda Exum are all residents of the Eastern District of Virginia.[16]

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[16] Complaint, ¶¶ 6-7.

Defendants are therefore subject to personal jurisdiction in the Eastern District of Virginia. Moreover, by relying upon the Subcontract, Plaintiff expressly consents to the jurisdiction of the Eastern District of Virginia.[17]

2. Venue is proper in Virginia.

Under 28 U.S.C. § 1391(a)(1), venue is proper in Virginia because all Defendants are residents of the state of Virginia, as residence is defined under § 1391(c) of the general venue statute. Further, under 28 U.S.C. § 1391(a)(2), a substantial part of the alleged acts or omissions giving rise to the alleged claim occurred in Virginia.[18]

3. Transfer to Virginia will enhance the convenience of the parties and witnesses and is in the interest of justice.

As discussed above, when the parties have entered into a valid forum selection clause, the party opposing transfer bears the burden of persuading the court that the contractually-selected forum is sufficiently inconvenient to justify retention of the dispute. *In re Ricoh Corp.*, 870 F.2d at 573; *Jumara*, 55 F.3d at 880. In a case that mirrored the facts before this Court, the Fifth Circuit held that it was "correct" for the district court to transfer a subcontractor's claims against a prime contractor, from the jurisdiction in

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[17] Subcontract, Exhibit B to Complaint, ¶ 12(b).

[18] All of Plaintiff's claims relate to AMC's alleged failure to pay Plaintiff money purportedly owed under the Subcontract Agreement. AMC handles all of its accounting from its corporate headquarters there in Virginia Beach, Virginia, and AMC's project management team, with the exception of those personnel required by contract to be onsite, who presided over and managed the subject project are located in Virginia.

which the project was located to the home state of the prime contractor, based on a forum selection clause in the subcontract agreement and the fact that the prime contractor's headquarters were located in the transferee forum. *In re Fireman's Fund Ins. Companies, Inc.*, 588 F.2d 93, 94 (5th Cir. 1979).

In interpreting the convenience aspects of Section 1404(a), the Fifth Circuit has set forth a number of private and public interest factors for consideration, none of which are given dispositive weight. *In re Volkswagen, AG*, 371 F.3d 201, 203 (5th Cir. 2004) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981) (granting mandamus relief and requiring transfer pursuant to Section 1404)).[19] With regard to the private interest factors, it is apparent that the sources of proof and witnesses will be more accessible in Virginia. As discussed above, Plaintiff's claims all relate to AMC's alleged failure to pay Plaintiff money purportedly owed under the Subcontract Agreement. AMC's principal place of business is located in Virginia Beach, Virginia, less than twenty miles from

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[19] The private concerns include: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive. *In re Volkswagen*, 371 F.3d at 203. The public concerns include: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws of the application of foreign law. *Id.*; *see also In re Horseshoe Entm't*, 337 F.3d 429, 433-34 (5th Cir. 2003) (granting mandamus relief and requiring transfer); *Walter Fuller Aircraft Sales v. Republic of Philippines*, 965 F.2d 1375, 1389 (5th Cir. 1992).

Norfolk.[20] AMC handles all of its accounting from its corporate headquarters there in Virginia Beach, Virginia, and the receipt and evaluation of subcontract proposals, subcontract selection, procurement and execution are conducted at its Virginia Beach office.[21] All invoices, bills, accountings, records, and other documents relating to payments—or lack of payments—to J-Crew Management, Inc. are located in Virginia Beach.[22] In addition, AMC's project management team, with the exception of those personnel required by contract to be onsite, who presided over and managed the subject project are located in Virginia.[23] AMC does not have any offices, mailing addresses, or telephone numbers in Texas.[24] AMC has never maintained any bank account in Texas and all construction project funds—including the funds sought by J-Crew Management, Inc. in this lawsuit—are maintained and paid out of AMC's Virginia bank accounts.[25]

With regard to the public factors, the Administrative Office of the U.S. Courts on behalf of the Federal Judiciary publishes federal judicial caseload statistics on its website located at http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/DistrictCourtsSep2011.aspx. According to the Office's statistics on federal district courts, the Western District of Texas had 6,343 pending cases and a median time from filing to disposition of 7.4 months for civil cases

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[20] Exhibit A, Affidavit of Bruce Exum, Jr., ¶ 2.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

as of September 30, 2011. Meanwhile, the Eastern District of Virginia had less than half as many pending (3,010) and had a median time from filing to disposition of only 5.1 months, making it the third fastest district court docket within the U.S.

VI. PRAYER

For the foregoing reasons, Defendants request the Court to Dismiss Plaintiff's claims for improper venue or, in the alternative, to transfer this action to the District Court for the Eastern District of Virginia, Norfolk Division.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed 05/23/12]

Civil Action No. 1:12-cv-228

UNITED STATES OF AMERICA, FOR THE USE OF
J-CREW MANAGEMENT, INC.,
Plaintiff,

v.

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,
BRUCE W. EXUM, JR., LINDA EXUM, AND THE
HANOVER INSURANCE COMPANY,
Defendants.

EXHIBIT A: AFFIDAVIT OF BRUCE EXUM, JR.

BEFORE ME the undersigned notary personally appeared Bruce Exum, Jr., a person known to me, and after I administered the oath to him did personally testify as follows:

1. "My name is Bruce Exum, Jr. I am over the age of eighteen and am fully competent to make this affidavit. I am the Chief Executive Officer and Co-founder of Atlantic Marine Construction Company, Inc. ("AMC"), which is a Defendant in the above styled cause. The facts in this affidavit are true, correct, and based upon my personal knowledge.

2. AMC's principal place of business is located in Virginia Beach, Virginia, less than twenty miles from Norfolk. AMC handles all of its accounting from its corporate headquarters there in Virginia Beach,

Virginia, and the receipt and evaluation of subcontract proposals, subcontract selection, procurement and execution are conducted at its Virginia Beach office. All invoices, bills, accountings, records, and other documents relating to payments—or lack of payments—to J-Crew Management, Inc. are located in Virginia Beach. In addition, AMC's project management team, with the exception of those personnel required by contract to be onsite, who presided over and managed the subject project are located in Virginia. AMC does not have any offices, mailing addresses, or telephone numbers in Texas. AMC has never maintained any bank account in Texas and all construction project funds—including the funds sought by J-Crew Management, Inc. in this lawsuit—are maintained and paid out of AMC's Virginia bank accounts.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Bruce Exum, Jr.
Bruce Exum, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME this 18th day of April, 2012, to certify which witness my hand and official seal.

/s/ Tanya E. Holland
Notary Public in and for
the State of Virginia

[NOTARY SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed 06/06/12]

Civil Action No. 1:12-CV-00228-LY

UNITED STATES OF AMERICA, FOR THE USE OF
J-CREW MANAGEMENT, INC.,
Plaintiff,

vs.

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,
BRUCE W. EXUM, JR., LINDA EXUM, AND THE
HANOVER INSURANCE COMPANY,
Defendants.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT OR TO TRANSFER VENUE

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Attorneys for Plaintiff

TO THE HONORABLE JUDGE YEAKEL:

Please accept this brief on behalf of Plaintiff, J-Crew Management, Inc, ("J-Crew") in opposition to the Motion to Dismiss Plaintiff's Amended Complaint or Alternatively to Transfer Venue ("Defendants' Motion") filed by defendants Atlantic Marine Construction Company, Inc. ("AMC"), Bruce W. Exum, Jr. and Linda Exum (collectively, "Defendants").

I. INTRODUCTION

This case arises from AMC's failure to pay J-Crew for the labor and materials J-Crew delivered to a construction project located at Fort Hood, Texas pursuant to a subcontract entered into between the parties (the "Subcontract"). Plaintiff, as master of the Complaint, has invoked only this Court's diversity jurisdiction and has deliberately foregone its federal claims in order to avail itself of Texas substantive law - specifically, TEX. PROP. CODE § 162.001, *et seq.* which protects Texas subcontractors like J-Crew by creating a constructive trust over construction payments made to a contractor for the improvement of real property in this state and imposing personal liability upon officers of a contractor in receipt of such funds; TEX. CIV. PRAC. & REM. CODE § 38.001(8) which entitles J-Crew to recover its attorney fees in a breach of contract action (A party "may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . an oral or written contract"); and. TEX. BUS. & COM. CODE § 272.001 which grants J-Crew the right to void the forum selection clause in the parties' Subcontract.

Defendants' Motion rests upon a theory of federal enclaves that has been considered and rejected by

courts time and again and relies upon a forum selection clause that was voided by J-Crew pursuant to Texas law and therefore not part of the parties' agreement. More specifically, Defendants ask this court to adopt the novel position that Fort Hood, Texas is located "outside the State of Texas"; yet, as both Texas and federal courts have explained, federal enclaves remain part of the State from which they were ceded. *Aviall Services, Inc. v. Tarrant Appraised Dist.*, 300 S.W.3d 441 (Tex. App.–Fort Worth 2009, no pet.)(holding inventory shipped from a warehouse in Texas to an Army Depot on a federal enclave geographically located within Texas was *not* transported "outside this State"); *First Hardin Nat. Bank v. Fort Knox Nat. Bank*, 361 F.2d 276, 279 (6th Cir. 1966), *citing Howard v. Commissioners of the Sinking Fund of the City of Louisville*, 344 U.S. 624 (1953).

Moreover, Defendants seize upon a forum-selection clause set forth in the Subcontract and ask this Court to blindly enforce the provision by either dismissing all of Plaintiffs claims or transferring venue of this matter to the Eastern District of Virginia, Defendants, however, ignore the plain fact that J-Crew enforced its substantive right, pursuant to Tex. Bus. & Com. Code § 272.001, to void this provision upon filing its Complaint in this matter; yet even if the forum-selection provision were part of the parties' agreement, it is well-settled that dismissal under Rule 12(b)(3) and 28 U.S.C. § 1406(a) is not the appropriate procedure for enforcing a forum-selection clause when a federal court is the parties' agreed forum – as the forum-selection clause at issue provides. *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 2007 WL 3256210 (W.D. Tex. Nov. 2, 2007).

Most importantly, while the forum-selection clause Defendants rely upon is void and thus not considered part of the Subcontract, venue still should remain in the Western District of Texas even if Tex. Bus. & Com. Code § 272.001 were not applicable to the parties' agreement. Significantly, the overwhelming weight of factors considered in a Section 1404(a) analysis, including the location of non-party witnesses, the ability to obtain jurisdiction over potential witnesses and parties, the convenience of the parties, and the location of the evidence, all scream for this matter to be heard in the Western District of Texas, Defendants' Motion therefore should be denied.[1]

II. STATEMENT OF FACTS

Plaintiff's claims arise from its delivery of labor and materials to a construction project located at Fort Hood, Texas pursuant to a Subcontract entered into between AMC and J-Crew. AMC owes J-Crew $159,675.87 for labor and materials provided to AMC in accordance with the Subcontract. Gould Decl. at ¶¶3,6. The funds at issue purportedly were paid by the United States Army Corps of Engineers from an account in Tennessee (Defs. Br. at p. 2) to an account maintained by Defendants in Virginia (Defs. Br. at p. 4).

Notably, Defendants have not provided J-Crew a clear explanation as to why they have failed to pay the $159,675.87 that remains due and owing. Gould Decl. at ¶7. Rather, Defendants, in conversations

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[1] Plaintiff acknowledges that it cannot state a claim against Defendants for violations of the Texas Prompt Pay Act and that such claims should be dismissed with prejudice from its Amended Complaint.

prior to the commencement of this matter, made only vague references to purported offsets for untimely or nonconforming work performed on the project at Fort Hood, Texas. *Id.* This is significant because J-Crew, in turn, subcontracted much of its work to subcontractors, suppliers and tradesmen, including Pace Painting, LLC of Harker Heights, Texas; Norman Woodworks, LLC of Killeen, Texas; Architectural Division 8, Inc. of San Antonio, Texas; Killeen Overhead Doors, Inc. of Killeen, Texas; Ponder Company, Inc. of Amarillo, Texas; The Blind Shop of Killeen, Texas; and Newman Sports Flooring of Hutto, Texas. Gould Decl. at ¶5. Many, if not all, of these second-tier subcontractors will be required to testify as witnesses in this matter regarding the timing and quality of the labor and materials delivered to AMC and may become necessary parties to this litigation. None of these second-tier subcontractors would be subject to process in the Eastern District of Virginia.

All of the work at issue in this matter occurred in the Western District of Texas; J-Crew's offices are located in Killeen Heights, Texas and all of its records and personnel similarly are located in Texas. Gould Decl. at ¶2 Plaintiff reviewed the Subcontract in Killeen, Texas and negotiated the Subcontract in Killeen, Texas (Gould Decl. at ¶4); the Subcontract was performed in Texas; all of the second-tier subcontractors and non-party witnesses that performed the work on the project are located in the Western District of Texas. Gould Decl. at ¶5. AMC made partial payments to J-Crew in Texas and the funds were deposited into an account maintained in Texas. Gould Decl. at 16.

While AMC notes that all of its accounting records and bank accounts are located in Virginia *(see* Defs. Br. at p.3), this dispute does not center on a disagreement over *whether* AMC has paid J-Crew for the labor and materials at issue; rather, the dispute arises from AMC's nebulous claims that the work J-Crew and its subcontractors performed in Texas was somehow deficient or somehow caused AMC to suffer damages. Gould Decl. at ¶7.

III. PLAINTIFF STATES A CLAIM FOR VIOLATION OF THE TEXAS CONSTRUCTION TRUST FUND ACT, TEXAS PROP. CODE § 162.001, *ET SEQ.*

Defendants mistakenly assert that J-Crew cannot maintain a cause of action for Defendants' violation of "the Texas Construction Trust Fund Act because [J-Crew] has failed to plead the existence of a construction contract for the improvement of real property in this state." Defs. Br. at p. 5. Defendants are wrong on both the facts and the law. Plaintiff expressly plead that the Subcontract "[ ] was for the improvement of real property in the State of Texas." Amended Compl. at ¶32. More importantly, however, the fact that the construction project was located at Fort Hood, Texas – a federal enclave – does not change the inescapable fact that the project was located within the State of Texas.[2]

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[2] Defendants have not submitted any evidence in support of their contention that Fort Hood is, in fact, a federal enclave relying only upon *Adams v. Calvert*, 396 S.W.2d 948, 949 (Tex. 1965), which was submitted on stipulated facts by the parties. More specifically, Defendants have not established where on Fort Hood the project was located, nor when such portion of Fort Hood was ceded nor when the United States accepted jurisdiction over such portion of Fort Hood. Nevertheless, Plaintiff will

A. Fort Hood is within the State of Texas

Defendants' argument that Fort Hood – as a federal enclave - is located "outside the State of Texas" has been considered and rejected by courts time and again. Notably, in *Aviall Services, Inc. v. Tarrant Appraisal Dist.*, 300 S.W.3d 441 (Tex. App.–Fort Worth 2009, no pet.), the Court held that inventory shipped from a warehouse in Texas to an Army Depot on a federal enclave geographically located within Texas was *not* transported "outside this State". *Id.* at 446 (emphasis added). It therefore necessarily follows that the construction project at Fort Hood, a federal enclave geographically located in Texas, is not "outside this state" as Defendants contend. Defs. Br. at p. 4 ("Plaintiffs Count Four fails to state a claim under the Texas Construction Trust Fund Act because the construction project at issue occurred outside the State of Texas.")

Federal courts similarly have concluded that military reservations ceded to the United States remain part of the state in which the land is located. Indeed, "[t]he principle has been well established that a military reservation within a state remains a geographical part of the city, county and state of which it was part at the time of acquisition by the United States." *First Hardin Nat. Bank v. Fort Knox Nat. Bank*, 361 F.2d 276, 279 (6th Cir. 1966), *citing Howard v. Commissioners of the Sinkng Fund of the City of Louisville*, 344 U.S. 624 (1953)("When the United States, with the consent of Kentucky, acquired the property upon which the Ordnance Plant is located, the property did not cease to be a part of

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assume that the location of the construction project at issue is, in fact, a federal enclave for purposes of this motion.

Kentucky. The geographical structure of Kentucky remained the same"). Similarly, when the United States acquired Fort Hood from Texas the property did not cease to be a part of the State of Texas. Notably, *Adams v. Calvert*, relied upon exclusively by Defendants, does not reach a different result. See, *Adams v. Calvert*, 396 S.W.2d 948, 949 (Tex. 1965). Rather, *Adams v. Calvert* merely held that the State could not tax personal property located on a federal enclave – an issue of jurisdiction not location.

B. The Texas Construction Trust Fund Act, Tex. Prop. Code 162.001, et seq. Does Not Regulate Property or Residents on the Federal Enclave

The Texas Construction Trust Fund Act does not regulate the United States Government, nor does it regulate the property or residents of Fort Hood. Instead, the Texas Construction Trust Fund Act ("Trust Fund Act") regulates the obligations of a private contractor (AMC) and its officers (Defendants Bruce Exam and Linda Exum) to Texas subcontractors performing work in this State after AMC received payment for the work J-Crew performed. Indeed, the Trust Fund Act by its own terms is not triggered until *after* the contractor (AMC) receives payment and does not place any obligation on the owner of the improved property. Texas Prop. Code § 162.001(a) ("Construction payments are trust funds under this chapter *if* the payments are made to a contractor...under a construction contract for the improvement of specific real property in this state") (emphasis added).

Consequently, Defendants' sweeping statement that "all other matters including the right to legislate and control the construction and improvement of real property within the ceded boundaries of Fort Hood,

fall 'outside the jurisdiction of the State' is of no moment as Defendants apparently misconstrue the object and effect of the Trust Fund Act. Defs. Br. at p. 5.

IV. DEFENDANTS' MOTION TO DISMISS PURSUANT TO 12(b)(3) AND 28 U.S.C. § 1406 IS IMPROPER AND SHOULD BE DENIED.

Defendants request this Court dismiss Plaintiff's claims pursuant to Rule 12(b)(3) and 28 U.S.C. § 1406 based upon a forum-selection clause providing for the parties' dispute to be litigated in the United States District Court for the Eastern District of Virginia. Defendants however incorrectly state that "the Fifth Circuit has squarely addressed the issue" and has approved of Rule 12(b)(3) as a proper method for seeking dismissal of Plaintiff's claims.

It is now well-settled that dismissal under Rule 12(b)(3) and 28 U.S.C. § 1406(a) is not the appropriate procedure for enforcing a forum-selection clause when a federal court is the parties' agreed forum – which it is in the instant case. *See Ellington Credit Fund, Ltd, v. Select Portfolio Servicing, Inc.*, A-07-CA-421 LY, 2007 WL 3256210 (W.D. Tex. Nov. 2, 2007). Indeed, this Court previously explained "the Fifth Circuit has not considered whether dismissal for improper venue is proper where the designated venue is another federal court, rather than a state court or foreign jurisdiction," specifically distinguishing *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005), relied upon by Defendants, from the facts of the instant case. *Id.* at *4.

Moreover, as Magistrate Judge Austin noted in *Ellington Credit Fund*, the majority of courts which have considered the issue have held that when a

federal court is the agreed forum under an enforceable forum selection clause the proper way to enforce such a clause is through a motion to transfer venue pursuant to 28 U.S.C. § 1404(a), and not a motion to dismiss for improper venue pursuant to Rule 12(b)(3) and § 1406(a). *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 2007 WL 3256210 at *4 (W.D. Tex. Nov. 2, 2007)(internal citations omitted).

Notably, "where jurisdiction is based upon diversity, the forum-selection clause allows suit in another federal court [as it does here], and venue is proper under 28 U.S.C. § 1391 in the court in which the plaintiff filed suit [as it is here], the Supreme Court directs district courts to apply the standard set forth in 28 U.S.C. § 1404(a) taking appropriate consideration of the parties' apparent choice of forum." *Brock v. Baskin-Robbins USA Co.*, 113 F. Supp. 2d 1078, 1085 (E.D. Tex. 2000). Consequently, Defendants Motion to Dismiss pursuant to Rule 12(b)(3) and 28 U.S.C. § 1406 for improper venue should be denied.

V. DEFENDANTS' MOTION TO TRANSFER VENUE SHOULD BE DENIED

The forum selection clause relied upon by Defendants is void and cannot be considered a valid part of the parties' Subcontract; yet even if the forum-selection clause were part of the parties' contract, the provision should not be enforced as consideration of all factors relevant to a Section 1404(a) venue analysis weighs heavily in favor of retaining venue in the Western District of Texas. *See, e.g., Brock v. Baskin Robbins USA Co.*, 113 F. Supp. 2d 1078 (E.D. Tex. 2000). Defendants' alternative Motion to Transfer Venue therefore should be denied.

A. Forum Selection Clause Is Void

Plaintiff has asserted claims against Defendants for Breach of Contract, Quantum Meruit, Unjust Enrichment, and violation of the Texas Construction Trust Fund Act. This court has original jurisdiction over these claims based on diversity jurisdiction pursuant to 28 U.S.C. § 1332. *See* Amended Compl. *at* ¶¶ 2,5-7. There is no question that Texas substantive law applies to these *claims. See Hyde v. Hoffmann-LaRoche, Inc.*, 511 F.3d 506, 510 (5th Cir.2007) ("In diversity cases, a federal court must apply federal procedural rules of law and the substantive law of the forum state, including its conflict-of-law rules."); *see also, Norwood v. Raytheon Co.*, 604 F. Supp. 2d 961, 965 (W.D. Tex. 2009).

Tex. Bus. & Com. Code § 272.001, which "applies to a contract that is principally for the construction or repair of an improvement to real property located in this state," grants J-Crew the substantive private right to void the forum selection clause in the parties' Subcontract. Specifically, the statute provides:

> [i]f a contract contains a provision making the contract or any conflict arising under the contract subject to another state's law, litigation in the courts of another state, or arbitration in another state, ***that provision is voidable*** by the party obligated by the contract to perform the construction or repair.

TEX. BUS. & COM. CODE § 272.001 (emphasis added). Notably, the Texas statute does not void the forum-selection clause in a construction contract – rather it provides contractors performing work in Texas the right to void such a provision at their option.

This dispute arises from a contract for the construction of a Child Development Center in Fort Hood, Texas (which is within the State of Texas as explained above) under which J-Crew was obligated to perform the construction. The Subcontract falls squarely within the scope of this statute; and the forum-selection provision designating the Eastern District Virginia as the proper venue for this dispute is therefore void at J-Crew's option. J-Crew, by filing this Complaint in the Western District of Texas, exercised its right to void the forum-selection provision in the Subcontract and the provision therefore cannot be considered to be a valid provision of the parties' agreement. *See generally, Harris v. Transamerica Life Ins. Co.*, 533 F. Supp. 2d 696, 701 (W.D. Tex. 2007)(In a suit based on diversity of citizenship jurisdiction, Texas law governs the interpretation of contracts).

Defendants erroneously suggest that Tex. Bus. & Com. Code Ann. § 272.001 is inapplicable because the Subcontract was for the improvement of real property at Fort Hood – a federal enclave – and not "for the improvement of real property in this state." This erroneous view of federal enclave jurisdiction misses the mark. First, as explained above, Fort Hood is located in Texas and its status as a federal enclave does not alter this reality. *Aviall Services, Inc. v. Tarrant Appraisal Dist.*, 300 S.W.3d 441 (Tex. App.– Fort Worth 2009, no pet.)("taxpayer's inventory shipped to [federal enclave], geographically located within Texas, was not transported `outside this State' ..."). Moreover, the United States Governments' own purchase order states that the project is located in Fort Hood, *Texas. See* Ex. A to Defs. Reply Memorandum (Docket No. 16-1) at p. 2(emphasis added); yet the court need not parse such extrinsic evidence to

determine whether that statute applies to the Subcontract as the Texas Legislature's intent is clear from the plain meaning of the statute.

When asked to construe a statute, the court begins with its plain language. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed. 2d 908 (2002). "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (internal citations omitted). The statute does not speak to jurisdiction, nor does it speak to real property *of* this state. Instead, the Texas legislature stated unambiguously, that the statute applies to a contract for the "improvement to real property located *in this state.*" *Id.* (emphasis added). The court in *Aviall Services* explained:

> The phrase "outside this State" in the context of the exemption from the ad valorem tax refers to location, not jurisdiction or power. This case does not involve the State's power to exercise jurisdiction or legislation over the property or residents of the Depot. ...Those aspects of a "state" within the federal system of these United States are not implicated.

Aviall Services, Inc. v. Tarrant Appraisal Dist., 300 S.W.3d 441, 446 (Tex. App.–Fort Worth 2009, no pet.). Similarly, the phrase "in this State" in the context of Texas Bus. & Com. Code § 272.001 refers to location, not jurisdiction or power.

B. Consideration of Section 1404(a) Factors Compels Venue in Western District of Texas.

While the forum-selection clause relied upon by defendants is void and thus not considered part of the parties' Subcontract, venue should remain in the Western District of Texas even if Tex. Bus. & Com. Code § 272.001 were not applicable to the parties' agreement. The overwhelming weight of factors considered in a Section 1404(a) analysis, including the location of non-party witnesses, the ability to obtain jurisdiction over potential witnesses and parties, the convenience of the parties, and the location of the evidence, all scream for this matter to be heard in the Western District of Texas.

Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court *may* transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (emphasis added). Notably, the decision whether to transfer a case under § 1404(a) is a matter within the district court's sound discretion. *ADS Sec. L.P. v. Advanced Detection Sec. Services, Inc.*, 2010 WL 1170976 (W.D. Tex. Mar. 23, 2010) citing *In re Volkswagen of America, Inc.*, 545 F.3d 304, 311 (5th Cir.2008) (en banc), *cert. denied*, --- U.S. —, 129 S.Ct. 1336, 173 L.Ed.2d 587 (2009); *Jarvis Christian College v. Exxon Corp.*, 845 F.2d 523, 528 (5th Cir.1988). In considering a motion to transfer venue pursuant to § 1404(a), the district court must consider "all relevant factors to determine whether or not on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum." *Peteet v. Dow Chemical Co.*, 868 F.2d 1428, 1436 (5th Cir.), cert. denied, 493 U.S. 935 (1989); *Ellington Credit*

Fund, Ltd. v. Select Portfolio Servicing, Inc., 2007 WL 3256210 (W.D. Tex. Nov. 2, 2007).

In determining whether a transfer is for the convenience of parties and witnesses and in the interest of justice, courts look to a series of private and public factors. *In re Volkswagen*, 545 F.3d at 315. The private interest factors include: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Id.* The public interest factors include: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws in the application of foreign law." *Id.* The Fifth Circuit has clarified that these factors are not exhaustive or exclusive and that none are dispositive. *Id.* at 315 ("Although the [factors] are appropriate for most transfer cases, they are not necessarily exhaustive or exclusive. Moreover, we have noted that 'none ... can be said to be of dispositive weight'").

Private Factors Favor Western District of Texas:

1. Convenience of the Witnesses

While the convenience of the witnesses "is often regarded as the most important factor to be considered in deciding whether to transfer venue," it is the convenience of *non-party* witnesses which is accorded the most weight. *Woolf v. Mary Kay Inc.*, 176 F.Supp.2d 642, 650 (N.D.Tex. 2001). A party seeking a transfer of venue must do more than make general

allegations that key witnesses are unavailable or are inconveniently located; it must identify specific witnesses and outline the substance of their testimony. *Am. Airlines, Inc. v. Rogerson ATS*, 952 F.Supp. 377, 384 (N.D.Tex.1996); *see also, Continental Airlines, Inc. v. American Airlines, Inc.*, 805 F.Supp. 1392, 1396 (S.D.Tex.1992) ("Where, as here, the moving party has merely made a general allegation that certain witnesses are necessary, without identifying them or the substance of their testimony, the motion must be denied.") .

Defendants have not, and cannot, identify a single non-party witness in the Eastern District of Virginia. Notably, Defendants rely on the general allegation that "AMC's project management team, *with the exception of those personnel required by contract to be onsite* [in Texas], who presided over and managed the subject project are located in Virginia." Defs. Br. at pp. 4, 11 (emphasis added). Notably, Defendants have not identified these potential witnesses, nor what testimony they may offer regarding the issues in dispute in this case. In fact, the logical inference from Defendants' statement is that "those personnel required by contract to be onsite" are themselves located in Texas and would be the most likely witnesses from AMC given their direct knowledge of the project.

Equally significant, when "key witnesses of the party seeking transfer are employees of that party, their convenience is entitled to less weight because that party will be able to compel their testimony at trial. *ADS Sec. L.P. v. Advanced Detection Sec. Services, Inc.*, 2010 WL 1170976 (W.D. Tex. Mar. 23, 2010) *citing, Gardipee v. Petroleum Helicopters, Inc.*, 49 F.Supp.2d 925, 931 (E.D.Tex.1999); *In re Triton*

Ltd. See, Litig., 70 F.Supp.2d 678, 690 (E.D.Tex.1999) ("It is the convenience of non-party witnesses, rather than of employee witnesses, however, that is the more important factor and accorded greater weight").

Conversely, although AMC has not identified specific work it claims to be defective, Plaintiff anticipates that its second-tier subcontractors and tradesmen, including Pace Painting, LLC of Harker Heights, Texas; Norman Woodworks, LLC of Killeen, Texas; Architectural Division 8, Inc. of San Antonio, Texas; Killeen Overhead Doors, Inc. of Killeen, Texas; Ponder Company, Inc. of Amarillo, Texas; The Blind Shop of Killeen, Texas; and Newman Sports Flooring of Hutto, Texas, will need to testify regarding the quality, timing, installation and construction of the any "defective work" claimed by AMC. Gould Decl. at ¶5. None of these second-tier subcontractors would be subject to process in the Eastern District of Virginia nor does Plaintiff believe they would voluntarily testify in Virginia. Moreover, even if such nonparty witnesses, (all of whom are based in Texas) would voluntarily testify in Virginia, they could not do so without incurring significant expense. There can be little dispute that the convenience of non-party witnesses heavily favors retaining venue of this matter in the Western District of Texas.

2. Location of Evidence

While AMC notes that all of its accounting records and bank accounts are located in Virginia *(see*, Defs. Br. at pp. 3-4, 11), this dispute does not center on disagreement over *whether* AMC has paid J-Crew for the labor and materials at issue; nor does this dispute involve the "evaluation of subcontract proposals [or AMC's] subcontract selection" (Defs. Br, at p. 11); rather, the dispute arises from AMC's failure

to pay J-Crew based upon nebulous claims that the work J-Crew and its second-tier subcontractors performed was somehow deficient or somehow caused AMC to suffer damages. All of the evidence as to the work J-Crew performed is located at Fort Hood, Texas. Indeed, the parties and potential experts will need to inspect the Child Development Center at Fort Hood in order to assess any claims by AMC of defective work. More importantly, when considering a motion to transfer venue, the location of books and other records is usually given little weight, unless the documents "are so voluminous that their transport is a major undertaking." *Gonsalez Moreno v. Milk Train, Inc.*, 182 F. Supp. 2d 590, 598 (W.D. Tex. 2002) citing, *Gardipee v. Petroleum Helicopters, Inc.*, 49 F.Supp.2d 925, 931 (E.D.Tex.1999). While AMC has not indicated the volume of any payment records and related documents relevant to this dispute, it is hard to imagine that they could be so voluminous that such documents could not be easily made available in the Western District of Texas given today's technology. In contrast, the Child Development Center at Fort Hood cannot be moved or transported to the Eastern District of Virginia. Consequently, consideration of the location of the evidence, just like consideration of the convenience of witnesses, weighs heavily toward retaining jurisdiction in the Western District of Texas.

3. Duplicative Proceedings

While it is true that all of the current defendants are subject to jurisdiction in the Eastern District of Virginia, J-Crew may be forced to assert claims against one or more of second-tier subcontractors identified above, in the event AMC asserts specific defects in the construction or materials at issue.

While J-Crew presently is not able to identify which subcontractor or supplier may be liable since AMC has asserted only general defects and discovery has not yet begun, the possibility that J-Crew will need to assert such claims remains. These second-tier subcontractors will not be subject to process in the Eastern District of Virginia, forcing J-Crew to maintain at least two separate actions in the event this matter were transferred to the Eastern District of Virginia – the instant matter and then a separate cause of action based upon the same facts and circumstances against any second-tier subcontractors here in Texas. This duplication of proceedings is antithetical to the purpose of § 1404(a) which is to *prevent* the waste "of time, energy and money" and "to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 26-27 (1960) (emphasis added).

Public Factors Favor Texas:

The public concerns that are to be considered in determining whether it is proper to transfer a case pursuant to §1404(a) include: "the administrative difficulties flowing from court congestion; the local interest in having localized interests decided at home; the familiarity of the forum with the law that will govern the case; and the avoidance of unnecessary problems of conflict of laws of the application of foreign law." *Id.* These factors also weigh decidedly in favor of having this matter determined in the Western District of Texas.

1. Administrative Efficiency of the Courts

Plaintiff submits that Defendants' analysis of the public concerns, which is limited to the fact that

judges of the Eastern District of Virginia dispose of civil cases, on average, 2.3 months faster than the judges in the Western District misses the mark. As an initial matter, Defendants maintain that they still may attempt to move to compel arbitration of this matter which would render the time to disposition (in either district court) moot. *See,* Defs. Br. in Support of Motion to Dismiss (Docket No. 12) at p. 1, fn. 1. Moreover, Defendants' analysis fails to consider the multiplicity of proceedings that the courts will need to adjudicate if this matter is transferred to the Eastern District of Virginia; yet even if one were to disregard the additional proceedings that may result if the matter is transferred, the theoretical 2.3 months relied upon by Defendants pales in comparison to the importance of the other public factors which all weigh decidedly in favor of denying Defendants' Motion.

2. *Familiarity of Forum with Law that will Govern the Case*

Plaintiff, as master of the Complaint, has invoked only this Court's diversity jurisdiction and has deliberately foregone its federal claims in order to avail itself of Texas substantive law – including TEX. PROP. CODE § 162.001, *et seq.* which protects Texas subcontractors like J-Crew by creating a constructive trust over payments made to a contractor (AMC) and imposing personal liability on officers (Bruce Exum and Linda Exum) of a contractor (AMC) that is in receipt of such funds; and TEX. CIV. PRAC. & REM. CODE § 38.001(8) which entitles J-Crew to recover its attorney fees in a breach of contract action (A party "may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for . . . an

oral or written contract."). Indeed, Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiff's claim for violations of the Trust Fund Act implicitly concedes that Texas law will apply to this case. Certainly this Court is in a better position to apply these unique Texas statutes than a foreign court in the Eastern District of Virginia.

Notably, any argument that Virginia law, rather than Texas law, would apply to Plaintiff's claims in the event this matter was transferred to the Eastern District of Virginia would serve only to strengthen the need to retain venue in the Western District of Texas as it would deny Plaintiff an adequate remedy. Virginia law does not provide for the recovery of attorney fees in a breach of contract action nor does it recognize the Texas Trust Fund Act imposing liability on Defendants Bruce Exum and Linda Exum for payment of the outstanding balance owed to J-Crew for the improvement of real property in the State of Texas. Consequently, transferring venue to the Eastern District of Virginia under such circumstances would have the effect of denying Plaintiff recovery against Defendants Brice Exum and Linda Exum as well as recovery of its attorney fees.

3. Local Interests and the Strong Public Policy of Texas

The Texas Legislature's enactment of Tex. Bus. & Com. Code § 272.001 represents a strong interest in protecting Texas subcontractors performing work and delivering materials in the State of Texas from out-of-state contractors seeking to make resolution of disputes impractical by forcing such Texas subcontractors to travel to foreign lands in order to obtain relief. Consequently, the Texas legislature provided

such subcontractors the substantive right to void any such provisions in the parties' agreement.

Moreover, Texas has an "interest in having localized interests decided at home". This dispute arises from AMC, a foreign contractor, seeking out subcontractors in Texas to perform construction on real property in Texas and then failing to pay for the labor and material it received. The effect of such nonpayment is born by J-Crew in Texas and reverberates throughout this State. Virginia simply does not have a comparable, if any, interest in this litigation.

The Forum Selection Clause:

While the forum-selection clause was voided by J-Crew, pursuant to Texas law, and cannot be considered part of the parties' agreement, the provision would not be determinative of venue even if it were found to be enforceable – rather the court must address the convenience of the chosen forum along with the other relevant factors given both parties' expressed preference for that venue. *See Brook v. Baskin Robbins USA Co.*, 113 F. Supp. 2d 1078, 1085 (E.D. Tex. 2000); *see also, Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-30, 108 S.Ct. 2239, 2244, 101 L.Ed.2d 22 (1988).

First, as explained in the foregoing analysis, not a single factor relevant to the Section 1404(a) analysis favors transferring this matter; while the forum-selection clause in a vacuum may indicate a preference for the Eastern District of Virginia, the reality is that the Eastern District of Virginia would impose substantial burdens on non-party witnesses, as well as the parties, including the unidentified AMC witnesses "required by contract to be onsite"; it would make access to relevant evidence, the Child Develop-

ment Center, more difficult and threatens to burden the courts and public with multiple proceedings; and it would either force the Virginia court to learn foreign law or would deprive Plaintiff of a remedy against Defendants Bruce Exum and Linda Exum.

Moreover, any apparent agreement of the parties that Virginia would be a preferential forum that could gleaned from the forum-selection clause must be viewed in the context of J-Crew's belief it had a right under Texas law to void such provision and litigate this matter in Texas. Plaintiff submits, even if the forum-selection clause were considered to be part of the Subcontract, that J-Crew has met its burden to demonstrate why it should not be enforced.

VI. CONCLUSION

Plaintiff J-Crew Management, Inc. based upon the foregoing reasons respectfully requests Defendants' Motion to Dismiss or Alternatively to Transfer Venue be denied.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed 06/06/12]

Civil Action No. 1:12-CV-00228-LY

UNITED STATES OF AMERICA, FOR THE USE OF
J-CREW MANAGEMENT, INC.
Plaintiff,

vs.

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,
BRUCE W. EXUM, JR., AND LINDA EXUM,
Defendants.

Declaration of Gregory Gould

I, Gregory Gould, being of full age do hereby certify and state:

1. I am the President of J-Crew Management, Inc. ("J-Crew"), the plaintiff in the above-captioned matter. The facts set forth herein are true to the best of my personal knowledge or based upon documents maintained by J-Crew in the ordinary course of business.

2. J-Crew's offices are located in Killeen, Texas and all of its records and personnel are located in or around Killeen, Texas.

3. J-Crew entered into a subcontract with Atlantic Marine Construction Company, Inc, ("AMC") on or about July 20, 2010 for the delivery of labor and materials to construct portions of the Child Develop-

ment Center at Fort Hood, Texas, A true copy of the agreement is attached hereto as Exhibit A (the "Subcontract").

4. AMC sent a draft of the proposed Subcontract to me in Killeen, Texas, I reviewed the agreement here in Killeen, Texas and negotiated the price of the contract here in Texas.

5. J-Crew subsequently entered into several subcontracts with other Texas contractors and tradesmen in order to perform its obligations under the Subcontract. Specifically, J-Crew entered into agreements with multiple contractors and tradesmen, including Pace Painting, LLC of Harker Heights, Texas; Norman Woodworks, LLC of Killeen, Texas; Architectural Division 8, Inc. of San Antonio, Texas; Killeen Overhead Doors, Inc. of Killeen, Texas; Ponder Company, Inc. of Amarillo, Texas; The Blind Shop of Killeen, Texas; Newman Sports Flooring of Hutto, Texas.

6. J-Crew provided labor and materials to AMC, in part through J-Crew's 2nd tier subcontractors and tradesmen, in accordance with its obligations under the Subcontract, ultimately completing its work in November 2011. While J-Crew has received partial payment from AMC, paid to J-Crew in Texas and deposited in an account maintained in Texas, there remains a balance of $159,675.87 due and owing.

7. While I have repeatedly requested AMC provide me with a clear explanation as to why it refuses to pay the $159,675.87 that remains due and owing, AMC has not provided me any detailed explanation or any documents relating to purported set-off claims. Instead, I have, been told only in general terms that

AMC was withholding payment due to unspecified offsets for untimely or nonconforming work.

I hereby declare under penalty of perjury that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false that I am subject to punishment.

Dated: June 5, 2012

/s/ Gregory Gould
Gregory Gould

EXHIBIT A

SUBCONTRACT AGREEMENT
[Reprinted at JA 18-41]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed 06/13/12]

Civil Action No. 1:12-cv-228

UNITED STATES OF AMERICA, FOR THE USE OF
J-CREW MANAGEMENT, INC.,
Plaintiff,

v.

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,
BRUCE W. EXUM, JR., AND LINDA M. EXUM,
Defendants.

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT OR, ALTERNATIVELY, TRANSFER VENUE

TO THE HONORABLE JUDGE YEAKEL:

A. Texas lacks jurisdiction to regulate real property or conduct occurring within the boundaries of Fort Hood, a federal enclave.

Under the federal Constitution, the United States has the power to acquire land from the states for certain specified uses and to exercise exclusive jurisdiction over such lands, which are known as federal enclaves. *Lord v. Local Union No. 2088, Intern. Broth. of Elec. Workers, AFL-CIO*, 646 F.2d 1057, 1059 (5th Cir. 1981). This Court has defined federal

enclaves as "pieces of territory carved out of states for federal use and control." *Lawler v. Miratek Corp.*, No. EP-09-CV-252-KC, 2010 WL 743925, *2 (W.D. Tex. Mar. 2, 2010). With regard to the land comprising Fort Hood, the jurisdiction of the United States is exclusive with the sole exception that the State of Texas reserved concurrent jurisdiction over the land for the purpose of executing civil and criminal process. *See Adams v. Calvert*, 396 S.W.2d 948, 949-51 (Tex. 1965). The reservation of a state's right to serve process has no bearing on the exclusive federal sovereignty over the enclave.[1] *Mater v. Holley*, 200 F.2d 123, 125 (5th Cir. 1952).

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[1] When legislative power over a territory is transferred from one sovereign to another, the *then existing* laws of the surrendering sovereign for the protection of private rights, so far as consistent with the laws of the new sovereign, continue in force until abrogated or altered by the new sovereign. *Mater v. Holley*, 200 F.2d 123, 124 (5th Cir. 1953) (citing to *Chicago, Rock Island & Pacific Ry. Co. v. McGlinn*, 114 U.S. 542, 544-45 (1885)). However, laws of the state adopted after the cession are without any force or effect on the federal enclave. *Lord v. Local Union No. 2088, Intern. Broth. of Elec. Workers, AFL-CIO*, 646 F.2d 1057, 1059 (5th Cir. 1981). Both the provisions of the Texas Business and Commerce Code (relating to voidability of venue provisions) and the Texas Property Code (relating to construction trust funds), which are relied upon by Plaintiff, were enacted well after Fort Hood was ceded to the United States Government in 1950. Section 272.001 of the Business and Commerce Code (voidability of venue provisions) was enacted in 2007, becoming effective April 1, 2009, and was based upon prior Section 35.52 of the Business and Commerce Code, which was enacted in 1993. *See* Acts 2007, 80th Leg., ch. 885, § 2.01, eff. April 1, 2009; Acts 1993, 73rd Leg., ch. 570, § 13. Section 162.001 of the Texas Property Code (Texas Construction Trust Fund Act) was enacted in 1983. *See* Acts 1983, 68th Leg., p. 3720, ch. 576, § 1, eff. Jan. 1, 1984.

B. Plaintiff's focus on geography misses the point.

Plaintiff focuses the Court's attention on the fact that Fort Hood is within the geographic boundaries of the state of Texas. However, the problem here is not one of geography, but jurisdiction. The State of Texas no longer has the authority to regulate property or activities occurring within the federal enclave at Fort Hood. *See Adams*, 396 S.W.2d at 949-51. The United States Supreme Court has repeatedly recognized that the Due Process and Commerce Clauses of the U.S. Constitution prohibit a State from seeking to regulate commerce outside of its territorial jurisdiction. *See, e.g.*, *MeadWestvaco Corp. v. Illinois Dept. of Revenue*, 128 S.Ct. 1498, 1502 (2008); *Transit Co. v. Kentucky*, 199 U.S. 194, 204 (1905).

Plaintiff's reliance on *Aviall Services, Inc. v. Tarrant Appraisal Dist.*, 300 S.W.3d 441 (Tex. App.—Fort Worth 2009, no pet.) is misplaced. Plaintiff cites to *Aviall* for the proposition that federal enclaves in Texas are not considered "outside this State." *See* Plaintiff's Response at p. 5. In *Aviall*, however, the State of Texas still had jurisdictional authority to tax the property at issue because the property was located outside the federal enclave—and inside the State of Texas—at the time the tax was levied. *Aviall*, 300 S.W.3d at 446 (noting that "this case does not involve the State's power to exercise jurisdiction or legislation over the property or residents of the [enclave]"). The issue in *Aviall* required the Court to construe the Texas Freeport Exemption on ad valorem taxes;[2] it did not involve an attempt to tax

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[2] Tax exemptions are construed narrowly and strictly against the taxpayer. *See Aviall*, 300 S.W.3d at 446-47. That presumption does not apply in this case.

property or regulate commerce outside of the State's jurisdictional authority. The key distinction between the Texas Supreme Court's decision in *Adams* and the Fort Worth Court of Appeals decision in *Aviall* is that the former recognizes the prohibition against a State taxing property outside of its jurisdiction while the latter recognizes the ability of the State to tax property within its jurisdiction.

C. Plaintiff's attempts to apply two Texas statutes[3] to regulate conduct occurring within a federal enclave fail as a matter of law.

Both the Texas Construction Trust Fund Act, and the Texas Business and Commerce Code provision, upon which Plaintiff bases its claim to avoid the parties' contractual forum selection clause, are statutes specifically designed to regulate construction projects located within the jurisdiction of the State of Texas. *See* TEX. PROP. CODE § 162.001(a); TEX. BUS. & COMM. CODE § 272.001. The Texas Construction Trust Fund Act applies only to construction payments under a "construction contract for the improvement of specific real property in this state." TEX. PROP. CODE § 162.001(a). The Business and Commerce Code provision "applies only to a contract that is principally for the construction or repair of an improvement to real property located in this state." TEX. BUS. & COMM. CODE § 272.001. These statutes should not be read as seeking to regulate activities outside of the State's regulatory jurisdiction. If they were read as broadly as Plaintiff proposes, the statutes would be unconstitutional. *See, MeadWestvaco Corp.*, 128 S.Ct. at 1502;

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[3] Plaintiff admits that it has not stated a claim under the Texas Prompt Payment Act and does not dispute that its Texas Prompt Payment Act claim should be dismissed.

Transit Co., 199 U.S. at 204. When construing statutes, the Court should avoid a construction that would render a provision unconstitutional. *See Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 715 (Tex. 1990); TEX. GOV'T CODE §311.021(1).

Here, it is undisputed that the construction project at issue in this litigation occurred within the boundary of a federal enclave. Notably, in its Section 1404 analysis, Plaintiff argues that the dispute at issue in this lawsuit centers not upon whether AMC paid J-Crew, but upon the deficiency of the work J-Crew and its second-tier subcontractors performed within the enclave. Plaintiffs Response, p. 14. Thus, in this litigation, Plaintiff undeniably attempts to apply Texas statutes to restrict activities occurring within a federal enclave. As a matter of law, the Texas statutes do not reach this activity occurring at Fort Hood.[4]

For the foregoing reasons, this Court should reject Plaintiff's attempt to avoid its contractual forum selection clause and its attempt to enforce Texas statutes to regulate the property and activities within a federal enclave. Plaintiff's claim under the Texas Construction Trust Fund Act should be dismissed

---

[4] Plaintiff's interpretation of these Texas statutes is also wrong as a matter of policy. The State of Texas cannot impose additional costs of doing business on a federal military base, such as forcing out of state entities to consent to jurisdiction in Texas despite whatever forum selection clauses or arbitration provisions they are able to negotiate. Indeed, if Plaintiff's interpretation of TEX. BUS. & COMM. CODE § 272.001 were applied consistently, this would mean that parties contracting with the United States for construction at Fort Hood could void the forum selection clauses imposed in their federal contracts. Such a result would create havoc on the federal government's ability to control its own contracts.

and Plaintiff's remaining claims should be dismissed for improper venue or, in the alternative, transferred to the parties' contractually-selected venue.

Respectfully submitted,

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PETITIONER'S BRIEF

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IN THE

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Petitioner,

v.

J-CREW MANAGEMENT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

Following the Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the majority of federal circuit courts hold that a valid forum selection clause renders venue "improper" in a forum other than the one designated by contract. In those circuits, forum selection clauses are routinely enforced through motions to dismiss or transfer venue under Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406. The Third, Fifth, and Sixth Circuits, however, follow a contrary rule. This case presents the following issues for review:

1. Did the Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), change the standard for enforcement of clauses that designate an alternative federal forum, limiting review of such clauses to a discretionary, balancing-of-conveniences analysis under 28 U.S.C. § 1404(a)?

2. If so, how should district courts allocate the burdens of proof among parties seeking to enforce or to avoid a forum selection clause?

PARTIES TO THE PROCEEDING

The following list identifies all of the parties before the United States Court of Appeals for the Fifth Circuit.

The Petitioner below was Atlantic Marine Construction Company, Inc. ("Atlantic Marine"). The Respondent below was J-Crew Management, Inc. ("J-Crew").

Atlantic Marine is a privately-owned corporation. No corporation owns 10% or more of its shares.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a), including Judge Haynes' special concurrence (Pet. App. 14a), is reported: *In re Atlantic Marine Construction Co., Inc.*, 701 F.3d 736 (5th Cir. 2012). The district court's decision is reprinted in Petitioner's Appendix. (Pet. App. 26a).

JURISDICTION

The court of appeals entered judgment on November 19, 2012. Atlantic Marine filed its Petition for Writ of Certiorari on January 25, 2013. This Court granted Atlantic Marine's Petition on April 1, 2013.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

This case requires an analysis of two federal venue statutes in Title 28, United States Code:

> **§ 1404. Change of Venue.**
>
> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

> **§ 1406. Cure or Waiver of Defects.**
>
> (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.
>
> (b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

This Petition also raises an issue under Rule 12 of the Federal Rules of Civil Procedure:

> **12(b) How to Present Defenses.**
>
> Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> ***

(3) improper venue

***

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed.

INTRODUCTION

When parties agree to a forum for litigation before any dispute arises, that agreement fixes the proper venue for litigation between the parties. Atlantic Marine and J-Crew entered into a construction contract. (JA 16-39). In it, they agreed that all disputes would be litigated in Norfolk, Virginia. (JA 28). In disregard of the forum selection clause, J-Crew sued Atlantic Marine in federal court in Austin, Texas. (JA 7). J-Crew alleged venue was proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events allegedly giving rise to this suit occurred in the Western District of Texas. (JA 8).

J-Crew's lawsuit should have been dismissed or transferred to the Eastern District of Virginia, Norfolk Division because venue was "improper" in the Western District of Texas under Fed. R. Civ. P. 12(b)(3), and "wrong" under 28 U.S.C. § 1406. Alternatively, transfer was required under § 1404(a) because J-Crew did not show exceptional circumstances that would override the parties' negotiated agreement. Any other conclusion erodes the right to contract and will result in wasteful litigation by parties seeking to avoid their own contractual choices.

STATEMENT OF THE CASE

1. The United States Army Corps of Engineers contracted with Atlantic Marine for the construction of a child development center located in Ft. Hood, Texas (the "Prime Contract"). Atlantic Marine negotiated and entered into a Subcontract Agreement with J-Crew (the "Subcontract") for the provision of construction labor and materials in connection with the Prime Contract. (JA 16-39, 82 ¶4). J-Crew, in turn, chose to "enter[] into several subcontracts with other Texas contractors and tradesmen in order to perform its obligations under the Subcontract." (JA 82 ¶5).

J-Crew claims Atlantic Marine failed to pay in full for the work performed. J-Crew does not dispute that its claims against Atlantic Marine fall within the scope of the mandatory forum selection clause of Subcontract Paragraph 12(b):

> The Subcontractor agrees that all other disputes not included in subparagraph (a) above, shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division. The Parties hereto expressly consent to the jurisdiction and venue of said courts.[1]

(JA 28). Ignoring the forum selection clause, J-Crew filed suit against Atlantic Marine in the Austin Division of the Western District of Texas.

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[1] Subparagraph (a) addresses subcontractor disputes for which the United States Government might be liable. (JA 27-28). It is not at issue here.

2. Atlantic Marine is a Virginia corporation with its principal place of business in Virginia Beach, just a few miles from Norfolk, Virginia. (JA 56 ¶2). Atlantic Marine's performance under the Subcontract was centered in Virginia. (JA 56-57 ¶2). It handled "the receipt and evaluation of subcontract proposals, subcontract selection, procurement and execution ... at its Virginia Beach office." (JA 56-57 ¶2). Many members of Atlantic Marine's project management team "who presided over and managed the subject project are located in Virginia." (JA 56-57 ¶2). Moreover, Atlantic Marine "handles all of its accounting from its corporate headquarters there in Virginia Beach, Virginia." (JA 56-57 ¶2). "All invoices, bills, records, and other documents relating to payments—or lack of payments—to J-Crew Management, Inc. are located in Virginia Beach." (JA 56-57 ¶2).

Atlantic Marine moved to dismiss J-Crew's complaint under Fed. R. Civ. P. 12(b)(3), and to dismiss or, alternatively, transfer the case to Virginia under 28 U.S.C. §§ 1406 and 1404(a). (JA 40-55). J-Crew opposed Atlantic Marine's motion, but did not challenge the Virginia forum selection clause as being unreasonable and unjust, or for reasons such as fraud or overreaching. (JA 58-80).

3. The district court refused to enforce the forum selection clause. (Pet. App. 26a-44a). It held that Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406 were inapplicable because venue was proper under 28 U.S.C. § 1391. (Pet. App. 32a-35a). It further held that the appropriate analysis required review under 28 U.S.C. § 1404(a) because the forum selection clause allowed for an alternate federal forum. (Pet. App. 32a-35a). The district court then placed the burden on Atlantic Marine to show whether transfer

under § 1404(a) was appropriate. (Pet. App. 36a). The court concluded: "Atlantic has not carried its burden to demonstrate that transfer of this case to Virginia would be in the interest of justice or increase the convenience to the parties and their witnesses." (Pet. App. 40a). The district court refused to dismiss the case or transfer it to Virginia.

4. Atlantic Marine filed a petition for writ of mandamus to the United States Court of Appeals for the Fifth Circuit seeking review of the district court's order.[2] The Fifth Circuit Majority denied Atlantic Marine's Petition (Pet. App. 13a), stating "we cannot find that the district court clearly abused its discretion." (Pet. App. 9a).

The Fifth Circuit recognized the circuit split on enforcement of forum selection clauses:

> [T]he choice between Rule 12(b)(3) and § 1406 on the one hand and § 1404 on the other depends on whether private parties can, through a forum-selection clause, render venue improper in a court in which venue is otherwise proper under § 1391. Federal circuit courts are divided on the issue.

(Pet. App. 4a). The Fifth Circuit adopted the approach taken by "a minority of the federal appellate

---

[2] The circuit courts recognize that mandamus is the only vehicle available to obtain appellate review of the denial of a motion seeking to change the venue of a lawsuit. *See, e.g., In re Volkswagen of America, Inc.*, 545 F.3d 304, 309-10, 318-19 (5th Cir. 2008) (en banc); *In re National Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1323 (Fed. Cir. 2009); *see also In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989) (granting mandamus to enforce forum-selection clause on remand from *Stewart*).

courts," and held that "when a forum-selection clause designates a specific federal forum or allows the parties to select the federal courts of a different forum, a motion to transfer under § 1404(a) is the proper procedural mechanism for enforcing the clause." (Pet. App. 5a).

Based on what it found "implied" and "implicit" in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), not on what this Court said explicitly (Pet. App. 6a), the Fifth Circuit reasoned: "*Stewart* teaches that Congress has by § 1404(a) removed the lateral transfer of cases among federal courts from the control of private contracts." (Pet. App. 11a). Thus, the Fifth Circuit concluded that a dismissal or transfer under Rule 12(b)(3) and § 1406 was not available. (Pet. App. 4a-8a, 13a). The Fifth Circuit explained that the contrary view, though followed by a majority of federal circuit courts, would render *Stewart* "a dead letter." (Pet. App. 6a n.18).

With respect to the § 1404(a) balancing analysis, the Fifth Circuit stated: "we cannot conclude that the district court clearly abused its discretion by placing the burden on the movant" to show that a transfer was appropriate. (Pet. App. 9a). With the burden on Atlantic Marine, the court found that the district court did not abuse its discretion when balancing the relevant factors. (Pet. App. 9a-13a). The court upheld the denial of the motion to dismiss or transfer.

5. Judge Haynes filed a "special concurrence" in which she expressly disagreed with the Fifth Circuit Majority:

> We should not leave the enforcement by specific performance of otherwise valid contractual forum selection clauses to the vicissitudes of

> virtually unfettered judicial discretion. Absent some compelling countervailing factor (something J-Crew does not even argue is present here), forum-selection clauses such as this one should be and should have been enforced by transfer or dismissal.

(Pet. App. 24a-25a). Judge Haynes recognized that this Court "has made clear that forum-selection clauses are enforceable." (Pet. App. 14a). Regarding the Fifth Circuit Majority's concern that private parties should not be able to "transcend federal venue statutes" by contract (Pet. App. 6a), Judge Haynes emphasized there is nothing novel or unusual about parties selecting among available venues in their contracts. (Pet. App. 16a-17a). "In so doing, the parties do not transcend federal law, but instead agree that neither will seek to maintain venue in certain otherwise permissive forums." (Pet. App. 17a).

Judge Haynes agreed with the majority of federal circuit courts that forum selection clauses should be enforced under Rule 12(b)(3) and § 1406. (Pet. App. 19a-20a). She wrote:

> A forum-selection clause that was negotiated and agreed to by sophisticated parties and is not challenged based on fraud, unreasonableness, or anything similar should be given effect. . . . Companies, such as Atlantic, that conduct business throughout a broad geographical area rely on forum-selection clauses to ensure that they can anticipate business costs and avoid litigation in a plethora of possible venues. Section 1406 seems to be the cleanest way to do so, treating the venue now "deselected" by the agreement as a "wrong" venue.

(Pet. App. 23a-24a). Judge Haynes recognized that *Stewart* did not address whether a forum selection clause could be enforced under Rule 12(b)(3) and § 1406 "because the claim of 'improper venue' had been waived by the defendant." (Pet. App. 18a).

Judge Haynes also noted that "the actual result of *Stewart* is exactly the opposite of the result reached here" because, on remand in *Stewart*, the Eleventh Circuit granted mandamus relief to enforce the forum selection clause even under a § 1404(a) convenience analysis. (Pet. App. 18a-19a). The Eleventh Circuit explained: "the clear import of [*Stewart*] is that the venue mandated by a choice of forum clause rarely will be outweighed by other 1404(a) factors." *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989). In the present case, Judge Haynes concluded that, under the district court's analysis, there was "no practical difference between this district court opinion and that of a district court that was assessing this same case without a forum-selection clause." (Pet. App. 24a).

SUMMARY OF THE ARGUMENT

1. This Court should reverse the Fifth Circuit's decision. By selecting a Virginia forum for disputes, the parties deselected otherwise available venues, rendering them "wrong" and "improper" under Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406(a). When applied to venue questions, the words "wrong" and "improper" are not tied exclusively to the federal venue statutes. A plaintiff's venue choice may be "wrong" or "improper" for many reasons, including because it is contrary to the venue statutes or, as here, because it violates the parties' contractual choice of forum. By holding parties to their agreements, this Court will be "announc[ing] and

encourage[ing] rules that support private parties who negotiate [forum selection] clauses." *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring).

The Fifth Circuit's refusal to enforce Atlantic Marine's contract under Rule 12(b)(3) and § 1406(a) is based on a misreading of *Stewart*'s footnote 8 and an unjustified concern regarding the ability of private parties to "transcend" federal venue statutes. In *Stewart*, the Court explained that it was not reaching the issue presented in this appeal. *See* 487 U.S. at 28 n.8. Thus, *Stewart* does not support the Fifth Circuit's approach. Private parties must be held to the terms of their contractual forum choices under Rule 12(b)(3) and § 1406(a). The district court's discretion to transfer cases in the interest of justice under § 1404(a) is not even implicated unless and until the parties have followed the terms of their contract and initiated litigation in the proper forum.

Under the Subcontract, J-Crew agreed to file suit (if at all) in Norfolk, Virginia. (JA 28). J-Crew did not have the unilateral right to breach its contract and usurp the authority of the Virginia courts to determine whether the case belongs in Virginia.

2. Even if the Court were to relegate enforcement of the parties' choice of forum clause to § 1404(a) (as the Fifth Circuit did), the Court should nonetheless reverse the Fifth Circuit's decision because it applied the wrong burden of proof. This Court recently explained that, when parties reach an agreement on a matter, "[t]he agreement itself becomes the measure of the parties' equities." *See U.S. Airways v. McCutchen*, 133 S.Ct. 1537, 1548 (2013); *see also id.* at 1551 (Scalia, J., dissenting) ("equity cannot override the plain terms of the contract"). Although *U.S. Airways* was written in a different context, the

same principle holds true here—when parties agree on a forum, they should not later be heard to complain that their choice was unfair, inconvenient, or inequitable.

The district court and Fifth Circuit erred when they allowed J-Crew to avoid its contract based on convenience arguments. The correct analysis required J-Crew (not Atlantic Marine) to bear a heavy burden to show that this was an "exceptional case" in which the interests of justice overrode the right to contract. *See Stewart*, 487 U.S. at 33 (Kennedy, J., concurring). J-Crew did not even attempt to meet that high standard.

ARGUMENT

A. Contracts Should Be Enforced as Written

1. *The Right to Select Venue by Contract Is Well-Established*

"Venue is largely a matter of litigational convenience." *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 316 (2006); *see also Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979) (venue "is primarily a matter of choosing a convenient forum."). "[T]he locality of a law suit — the place where judicial authority may be exercised — though defined by legislation relates to the convenience of litigants and as such is subject to their disposition." *Nierbo Co. v. Bethlehem Shipbuilding Corp., Ltd.*, 308 U.S. 165, 168 (1939). This Court has recognized "that 'consent' may give 'venue.'"[3] *Id.* at 171.

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[3] In the Federal Court Jurisdiction and Venue Clarification Act of 2011, Congress reaffirmed the role of consent in the venue analysis when it amended § 1404(a) to allow transfers to "any district or division to which all parties have consented." *See* 28

Objections to venue are within a litigant's control, and may be waived. *See Leroy*, 443 U.S. at 184 (parties may choose "to waive valid objections to otherwise improper venue"); 28 U.S.C. § 1406(b) (recognizing that venue objections are waived if a party "does not interpose timely and sufficient objection to the venue"); Fed. R. Civ. P. 12(h)(1) (providing that a Rule 12(b)(3) motion is waived if not raised in the initial responsive pleading). Just as litigants may waive objections to venue, they may also, by agreement, waive the right to litigate in a venue that would otherwise be available under 28 U.S.C. § 1391. *See National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964) ("it is settled ... that parties to a contract may agree in advance to submit to the jurisdiction of a given court"). Recognizing this right to deselect otherwise available venues is consistent with the purposes of venue statutes—to protect defendants from litigation in inconvenient, far away forums. *See Leroy*, 443 U.S. at 183-84 ("In most instances, the purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial.").

Since this Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), there has been widespread recognition of the right to select a venue by contract:

U.S.C. § 1404(a); *see also* H.R. REP. 112-10, 2011 U.S.C.C.A.N. 576, 580 & n.17. That change was intended to abrogate the rule from *Hoffman v. Blaski*, 363 U.S. 335 (1960), that "the transferee court must have personal jurisdiction independent of the defendant's consent" before a § 1404(a) transfer would be allowed. *See* 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 111.12[1][c] (3d ed. 2012).

> Following *Bremen*, both state and federal courts adopted its rule of decision, not only in admiralty cases, but in virtually all forum selection settings, and it now clearly represents the weight of authority in the United States.

7 RICHARD A. LORD, WILLISTON ON CONTRACTS § 15.15 at 371 (4th ed. 2010). Forum selection clauses "now appear in contracts of every description and, if anything, are being used with greater frequency." 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE ("WRIGHT & MILLER") § 3803.1 at 50 (3d ed. 2007).

There is a strong presumption in favor of enforcing forum selection clauses, and a high burden on the party resisting the clause:

> The correct approach would have been to enforce the forum clause specifically unless [the resisting party] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.

Bremen, 407 U.S. at 15. To overcome a forum selection clause, a party must make a "strong showing that it should be set aside." *Id.* *Bremen* also demonstrates that parties can select forums for disputes that Congress could not, including designating a foreign court. *See id.* at 2 ("Any dispute arising must be treated before the London Court of Justice.").

Since *Bremen*, the Court has reaffirmed that forum selection clauses are subject "to judicial scrutiny for fundamental fairness," but the party challenging the clause bears a "heavy burden of proof." *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991).

J-Crew did not even attempt to meet the burden of proof required to avoid its agreement under *Bremen* and *Carnival Cruise Lines*.

2. *Dismissal or Transfer Was Mandatory Under Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406 Because J-Crew Filed Suit in the Wrong Venue*

Atlantic Marine timely objected to being sued in a venue other than the one designated by contract, invoking Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406. Under § 1406, dismissal or transfer was mandatory:

> The district court of a district in which is filed a case laying venue in the ***wrong*** division or district ***shall*** dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. § 1406(a) (emphasis added). Congress' use of the word "shall" confirms that dismissal or transfer is required, and is not a matter of discretion for the district court.[4] *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("the mandatory 'shall' ... normally creates an obligation impervious to judicial discretion"). Although a district court has discretion to select between the remedies of dismissal or transfer, it has no discretion to retain a case that was filed in the wrong venue.

The word "wrong" in § 1406(a) should be given its plain meaning. "Wrong" is broadly defined as

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[4] Although Rule 12(b)(3) provides for dismissal based on improper venue, Congress amended 28 U.S.C. § 1406(a) to provide the district court with the alternative of transferring a case in "the interest of justice." *See Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466-67 (1962).

"[b]reach of one's legal duty" or the "violation of another's legal right." BLACK'S LAW DICTIONARY 1751 (9th ed. 2009). Atlantic Marine and J-Crew agreed what the "right" venue would be if a dispute arose under the Subcontract. It follows that any other venue would be "wrong" for litigating such disputes as measured by the parties' contractual commitment. By filing suit in breach of the forum selection clause, J-Crew filed suit in the "wrong" venue.[5]

Congress did not limit the remedy under § 1406(a) exclusively to cases in which a party files suit in a venue other than those allowed under 28 U.S.C. § 1391. Instead, § 1406(a) is broader, requiring the district court to dismiss or transfer cases whenever a lawsuit is filed in the wrong division or district. Accordingly, § 1406(a) has been correctly used in cases filed in a forum that lacks personal jurisdiction over a defendant. *See* 17 MOORE'S FEDERAL PRACTICE § 111.31 (3d ed. 2012) (discussing the expansive reading of "wrong venue" under § 1406).

Following the plain language of Rule 12(b)(3) and § 1406(a), most federal circuit courts have correctly held that a valid forum selection clause renders venue "wrong" in a forum other than the one selected by contract. *See, e.g., Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968, 970-73 (8th Cir. 2012); *TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472, 478 (2d Cir. 2011); *Slater v. Energy Servs. Grp. Int'l, Inc.*, 634 F.3d 1326, 1332-33 (11th Cir. 2011); *Hillis v. Heineman*, 626 F.3d 1014, 1016-17 (9th Cir. 2010); *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d

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[5] The same result follows under Rule 12(b)(3), which uses the term "improper." "Improper" means "incorrect; unsuitable or irregular." BLACK'S LAW DICTIONARY 826 (9th ed. 2009).

759, 760-62 (7th Cir. 2006); *Sucampo Pharms. v. Astellas Pharma, Inc.*, 471 F.3d 544, 548-50 (4th Cir. 2006); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir. 1992); *Commerce Consultants Int'l, Inc. v. Vetrerie Riunite*, 867 F.2d 697, 699-700 (D.C. Cir. 1989). This Court should approve these holdings.

3. 28 U.S.C. § 1404(a) Does Not Alter the Right to Contract

The Fifth Circuit recognized the majority rule that a valid forum selection clause renders venue improper and wrong in a venue other than the one designated by contract, but erroneously created an exception for cases involving a forum selection clause designating an alternative federal forum. (*See* Pet. App. 6a-8a). The Fifth Circuit's exception does not appear in the text of § 1406 or Rule 12(b)(3).

Moreover, "both the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure." *Van Dusen v. Barrack*, 376 U.S. 612, 636-37 (1964). Section 1404(a) does not relieve parties from their contractual choices. Section 1404(a) is not even implicated unless and until the parties are involved in litigation in a proper forum. *See Ex Parte Collett*, 337 U.S. 55, 60 (1949) ("§ 1404(a) of the Code deals with the right to transfer an action properly brought").

4. Rule 12(b)(3) and § 1406 Provide the Most Appropriate Vehicles to Enforce Forum Selection Clauses

Rule 12(b)(3) and § 1406 provide the most appropriate vehicles for timely resolving venue questions involving forum selection clauses. *See* 2 MOORE'S

FEDERAL PRACTICE § 12.32[1] (describing a Rule 12(b)(3) motion as the "better approach" to raising objections based on a forum selection clause). Objections under Rule 12(b)(3) and § 1406 are subject to waiver, so they must be presented at the beginning of the litigation. *See* Fed. R. Civ. P. 12(h)(1) & 28 U.S.C. § 1406(b). Delays in resolving venue issues would strip contracting parties of the benefit of their bargain when venue is governed by contract.

Further, unlike summary judgment or Rule 12(b)(6) procedures, Rule 12(b)(3) permits a district court to resolve fact questions, if necessary, to make venue determinations. *See, e.g., Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 355 (2d Cir. 2005); *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 238 (5th Cir. 2009); *Continental Casualty Co. v. American Nat'l Ins. Co.*, 417 F.3d 727, 733 (7th Cir. 2005); *Bryant v. Rich*, 530 F.3d 1368, 1376 (11th Cir. 2008). *Bremen* sets a high standard to avoid a chosen forum. A party challenging a forum selection clause under *Bremen* may need to present evidence to show that a particular clause is unreasonable and unjust, or the product of fraud or overreaching. *See* 407 U.S. at 15. When facts are disputed, the district court must have the ability to resolve the dispute early in the litigation, otherwise many parties may be deprived of the benefit of the contractual forum selection.

5. Other Options Are Not As Effective, and Cannot Be Consistently Applied

Courts have analyzed forum selection clauses under several other procedural mechanisms, but those other options cannot be applied as effectively or consistently as Rule 12(b)(3) and § 1406. Those options include:

a. Summary Judgment. In *Carnival Cruise Lines*, a forum selection clause was enforced by summary judgment. *See* 499 U.S. at 588. Summary judgment is only appropriate when the facts are undisputed. *See* Fed. R. Civ. P. 56(a). Therefore, that procedure provides no relief to a contracting party when there is a genuine issue of material fact regarding whether the clause is enforceable under *Bremen*. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

b. Rule 12(b)(6). The First Circuit reviews forum selection clauses using Fed. R. Civ. P. 12(b)(6). *See Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 15 (1st Cir. 2009). Review under Rule 12(b)(6), however, is limited to the pleadings, documents attached to or referenced therein, or matters of public record. *See* 2 MOORE'S FEDERAL PRACTICE § 12.34[2] (3d ed. 2012). It does not allow the district court to resolve disputed fact issues. Moreover, this approach also elevates the status of the forum selection clause to an element of the claim, effectively making the venue issue unwaivable.[6]

c. 28 U.S.C. § 1404(a). The Fifth Circuit limits review of forum selection clauses calling for an alternative federal forum to a discretionary analysis under 28 U.S.C. § 1404(a). Section 1404(a) is only available to transfer cases to another federal court, and not to a state or foreign court. Accordingly, the Fifth Circuit found it necessary to allow parties to invoke Rule 12(b)(3) and § 1406(a) to compel dismis-

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[6] Treating a forum selection clause as an element of a claim also creates an *Erie* problem in that a plaintiff may need to prove a different set of elements to succeed in federal court than it would need to show if the same case were pending in state court.

sal of cases governed by a contract with a state or foreign forum selection clause, even though those same procedures are not available to parties like Atlantic Marine who are seeking to enforce a clause calling for an alternative federal forum. Thus, the Fifth Circuit construes the word "improper" from Rule 12(b)(3) and the word "wrong" in § 1406 to mean different things depending on the parties' choice of forum – broadly when parties choose a state or federal forum; but narrowly and tied exclusively to federal venue statutes when parties choose a federal forum.

The answer to the question whether a valid forum selection clause renders venue improper or wrong in a district other than the one selected by contract should not depend on the forum selected. The fact that the Fifth Circuit's approach draws a distinction based on a perceived necessity (rather than based on statutory language enacted by Congress) is a strong indicator that the analysis is wrong. Moreover, although the Fifth Circuit was concerned about parties transcending federal venue statutes such as § 1391 by contract, the court's analysis of clauses mandating a state or foreign court forum permits exactly that result. There is no reason why forum selection clauses should receive such differential treatment depending upon whether the clause selects a federal, state, or foreign court.

Rule 12(b)(3) and § 1406 have only one meaning. The Court should endorse Rule 12(b)(3) and § 1406(a) as the appropriate vehicles to enforce forum selection clauses in all cases, regardless whether the clause designates an alternative federal, state, or foreign court.

6. *Relying on § 1404(a) to Enforce Forum Selection Clauses Encourages Parties to Breach Their Contracts and to Forum Shop*

The Fifth Circuit's approach to forum selection clauses encourages forum shopping, creates incentives for parties to breach their contracts, and sets up a race to the courthouse.[7] Plaintiffs are encouraged to shop for a favorable forum to sue because their choice of forum will control the choice of law too (unless the parties agreed otherwise). When a lawsuit is filed in a proper forum, the district court applies the choice of law rules of the state in which it sits. *See Klaxon v. Stentor Electric Mfg. Inc.*, 313 U.S. 487, 496 (1941). When a case is transferred for convenience under § 1404(a), the applicable law transfers with the case. *See Ferens v. John Deere Co.*, 494 U.S. 516, 522-23 (1990); *Van Dusen*, 376 U.S. at 635-37. In a case such as this one where there is no choice of law clause, the party that breaches its contract is rewarded by being able to retain the benefits of the law of the forum in which the suit is filed, instead of the law that would be applied in the contractually-chosen forum.

The incentive to breach the forum selection clause does not exist when the clause is enforced under Rule 12(b)(3) or § 1406 because the law does not transfer with a case filed in an improper venue. *See Wisland v. Admiral Beverage Corp.*, 119 F.3d 733, 735-36 (8th Cir. 1997); *Ellis v. Great Sw. Corp.*, 646 F.2d 1099,

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[7] In its Brief of *Amicus Curiae* in Support of Petition for Writ of Certiorari, the Texas Civil Justice League ("TCJL") also correctly explained that the Fifth Circuit's decision creates a forum-shopping opportunity between state and federal courts because, under Texas law (like the law of most other states) forum selection clauses are strictly enforced. *See* TCJL Br. at 3-6.

1109-10 (5th Cir. 1981); *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 992 (11th Cir. 1982); *Martin v. Stokes*, 623 F.2d 469, 473 (6th Cir. 1980). Accordingly, the decision of which set of rules applies to determine whether a forum selection clause is enforced also controls the analysis of what law will govern when the case finds its proper home. *See Lafferty v. Riel*, 495 F.3d 72, 76 (3d Cir. 2007) ("Distinctions between §§ 1404(a) and 1406(a) have to do with discretion, jurisdiction, and choice of law.").

By relegating enforcement of forum selection clauses to a discretionary matter, the Fifth Circuit's approach also creates an incentive to race to the courthouse.[8] If a contracting party can rely on consistent enforcement of a forum selection clause to control the forum for litigation, there is no need to terminate pre-lawsuit negotiations for fear that the opposing party will file suit in its preferred forum, regardless what the contract requires. When enforce-

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[8] In an analogous context, this Court recognized a serious problem that would arise if courts refused to enforce international arbitration agreements:

> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes [of promoting orderliness and predictability in international transactions], but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-17 (1974). The refusal to enforce such a clause, described by the Court as a "specialized kind of forum-selection clause," would encourage parties to rush to a favorable court to gain a tactical advantage. *Id.* at 507, 519. The same situation would arise domestically if courts have discretion to decline to enforce forum selection clauses.

ment of a forum selection clause is discretionary, the contracting party must weigh the risk of being sued in the wrong forum in its analysis of whether to continue negotiations, or to initiate litigation. That risk creates an incentive to rush to the courthouse to select the forum—or at least the applicable law—for litigation.

By holding parties to their contractual choices through an improper venue analysis, this Court will eliminate the forum shopping opportunity and incentives for parties to rush to the courthouse to obtain a favorable forum. All parties should receive the benefits they bargained for under their contract, rather than a reward for breaching the contract.

7. Stewart Does Not Change the Result

This Court's decision in *Stewart* does not require a federal district court to limit its review of a forum selection clause selecting an alternative federal forum to the discretionary, balancing analysis for convenience transfers under 28 U.S.C. § 1404(a). In *Stewart*, the Court addressed a forum selection clause only in the context of a motion to transfer venue under § 1404(a) because the parties waived any arguments under § 1406 and Rule 12(b)(3). *Stewart*, 487 U.S. at 28. The Court analyzed "the issue whether a federal court sitting in diversity should apply state or federal law in adjudicating a motion to transfer a case to a venue provided in a contractual forum-selection clause." *Id.* at 24. The Court found that federal law controlled the § 1404(a) analysis, meaning that an Alabama statute (which would have invalidated the forum selection clause) would not control the outcome. *Id.* at 30-32. The

Court did not address other rules or concepts under which a forum selection clause might be enforced.

In footnote 8 of the *Stewart* majority opinion, the Court explained that it was not addressing whether venue was improper as a result of the forum selection clause:

> The parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406(a) because respondent apparently does business in the Northern District of Alabama. *See* 28 U.S.C. § 1391(c) (venue proper in judicial district in which corporation is doing business).

Id. at 28 n.8. It follows that, if "[t]he parties do not dispute" whether venue was proper, the Court was not reaching or deciding the issue the parties elected not to raise on appeal. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) (review is ordinarily limited to the questions presented by the parties and accepted by the Court).

The Fifth Circuit erred by reading footnote 8 as an implicit holding that parties cannot, through a forum selection clause, render a venue improper for purposes of Rule 12(b)(3) and 28 U.S.C. § 1406(a). (Pet. App. 5a-6a). The Fifth Circuit's error arises from its reliance on WRIGHT & MILLER § 3803.1. (Pet. App. 6a n.15). WRIGHT & MILLER addressed footnote 8 as follows:

> Indeed, in the *Stewart* opinion, the Court explicitly stated that "the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406(a) because respondent [corporation] apparently does business in the Northern District of Alabama,"

making venue proper under Section 1391(c) of Title 28.

Id. § 3803.1 at 116.[9] By replacing the phrase "the parties do not dispute that" with "the Court explicitly stated that," WRIGHT & MILLER changed the meaning of footnote 8. The Fifth Circuit erred in concluding that this Court resolved the questions presented in this case implicitly, in a footnote, when the issue was not squarely presented.

B. The District Court Did Not Have Discretion Under § 1404(a) to Let J-Crew Disregard Its Agreement

1. Following Stewart, Forum Selection Clauses Should Be Enforced under § 1404(a) Absent Exceptional Circumstances

Even if this Court held that enforcement of forum selection clauses is limited to a § 1404(a) balancing analysis, the ineluctable conclusion is still that the district court was required to transfer this case to Virginia. In *Stewart*, the Court explained that "[t]he presence of a forum-selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the district court's calculus." 487 U.S. at 29. Although the Court did not give "dispositive" weight to the forum selection clause in a § 1404(a) analysis, the Court found the rules from *Bremen* "instructive" in resolving the dispute. *Id.* at 28, & 31. In concurrence, Justice Kennedy emphasized that "a valid forum-selection clause is given controlling weight in all but the most exceptional cases." *Id.* at 33.

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[9] WRIGHT & MILLER cites footnote 7 of *Stewart*. The quote is from footnote 8. *See* WRIGHT & MILLER § 3803.1 at 116 n.75.

A forum selection clause is not given dispositive weight in the § 1404(a) analysis because, unlike the general venue statutes that are designed to protect the interests of the parties, *see Leroy*, 443 U.S. at 183-84, § 1404(a) also plays a role in protecting public interests in the judicial system. *See Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 21 (1960). The public interest includes the need to allow courts to administer cases to avoid unnecessary duplication and wasted resources. *Id.* at 24-27. But there is also a strong public interest to be served by enforcing forum selection clauses except in exceptional cases:

> enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system.
>
> * * *
>
> The federal judicial system has a strong interest in the correct resolution of these questions, not only to spare litigants unnecessary costs but also to relieve courts of time-consuming pretrial motions.

Stewart, 487 U.S. at 33 (Kennedy, J., concurring). Although *Stewart* left open a small window for a court to transfer a case to a forum other than the one selected in the contract, nothing in *Stewart* shows an intent to undermine the right to contract.

2. *A Party Bears a Heavy Burden to Overcome Its Contractual Choice*

Contracts should be enforced as written. Unless a plaintiff meets the "heavy burden" to show that a contract is unenforceable under *Bremen*, *see* 407 U.S. at 17, the parties should not be heard to complain

that their contract should be overridden because it is inconvenient. Any inconvenience associated with a contractually-selected forum should be addressed at the time of contracting. *Id.* at 16-17; *see also U.S. Airways*, 133 S.Ct. at 1548 (the agreement is "the measure of the parties' equities"). After all, when parties agree to terms of a contract, they are agreeing to all terms of the contract; selectively removing (or refusing to enforce) one provision changes the economics of the equation. *See Carnival Cruise Lines*, 499 U.S. at 586 (recognizing that "limiting the fora in which [a party] may be sued" can impact the fares charged for services provided).

To ensure that forum selection clauses are not ignored as a pure matter of discretion (as happened in this case), the burden of proof must be placed on the party challenging the clause. *See In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995); 17 MOORE'S FEDERAL PRACTICE § 111.13[1][p][i][B] (3d ed. 2012). That burden should be such that a party cannot avoid the contractually-chosen forum based on inconveniences that were foreseeable at the time of contracting. *See Bremen*, 407 U.S. at 16-17. Otherwise, parties will view § 1404(a) as a mechanism to attempt to renegotiate their contracts after a dispute arises. When there is a valid forum selection clause, it should be enforced under § 1404(a) absent an extraordinary countervailing public interest.

Placing the burden of proof on a party seeking to overcome its contractually-chosen forum is also logical and consistent with the concept of a forum selection clause. If parties follow their contract, any lawsuits would be filed in the forum selected in the

contract. Thus, if a party attempted to move the case somewhere else, the moving party would bear the burden to prove that a transfer is justified. *See In re Volkswagen*, 545 F.3d 304, 315 (5th Cir. 2008) (en banc) (imposing a "good cause" burden on the moving party when no forum selection clause was at issue). A contracting party should not be able to shift the burden to its opponent simply by breaching the contract and filing suit in a forum other than the selected one.

By placing the burden of proof on the moving party instead of the party seeking to avoid its contract, the district court and Fifth Circuit's decisions encourage parties to breach their contracts and forum shop. This is the opposite of "announc[ing] and encourag[ing] rules that support private parties who negotiate such clauses." *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring).

3. *J-Crew Was Allowed to Escape Its Contract Without Meeting Any Burden at All*

The district court's analysis focused on whether Atlantic Marine demonstrated that Virginia would be a more convenient forum for this litigation. (Pet. App. 40a). The district court and Fifth Circuit erred by relieving J-Crew of its burden to justify the departure from the parties' contract. When Atlantic Marine and J-Crew entered into their contract, they agreed that Virginia was the appropriate forum, taking into account all of the facts surrounding the contract they negotiated.

The lower courts compounded their error by allowing this case to remain in Texas based on a minimal showing of inconveniences that were all foreseeable at the time of contracting. (Pet. App. 36a-39a).

J-Crew identified several companies it hired in Texas to perform work under the Subcontract. (JA 82 ¶5). When J-Crew hired those companies, J-Crew had already agreed to the Virginia forum selection clause for disputes with Atlantic Marine. J-Crew should have taken the clause into account when it unilaterally chose to subcontract work to other entities. Courts should not allow parties unilaterally to rewrite their agreement just because a dispute has arisen. When the correct rules are applied, J-Crew's convenience arguments are not relevant to support retention of this case in Texas.

The district court only superficially addressed the public interest factors implicated in the § 1404(a) analysis.[10] (Pet. App. 39a-40a). The district court did not identify anything exceptional about this case that would justify rejection of the forum selection clause. Instead, the district court devoted most of the public interest discussion to explaining why a Texas court would be more familiar with applying Texas law to this diversity case. (Pet. App. 40a). As the district court acknowledged, however, Texas law is implicated only because J-Crew breached its contract and filed suit in Texas. (Pet. App. 40a). Had this lawsuit

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[10] The Fifth Circuit addressed the public interest factors in a single paragraph that accused Atlantic Marine of failing to raise in the district court the strong public policy interest favoring enforcement of forum selection clauses. (Pet. App. 12a-13a). The Fifth Circuit was wrong. Atlantic Marine explained the impact that a forum selection clause had on the § 1404(a) analysis, directed the district court to Justice Kennedy's concurring opinion, and argued that forum selection clauses should be given "controlling weight in all but the most exceptional circumstances" because they protect "the legitimate expectations of the parties" and further "vital interests of the justice system." (JA 50-51).

been filed in Virginia, Virginia law presumptively would govern, and the Virginia court would be more familiar with that law. Thus, the district court's reasoning shows yet another example of J-Crew being rewarded for its breach of contract.

The district court's § 1404(a) analysis was flawed at nearly every turn. When the correct rules are applied, there is no basis for retention of this case in Texas. Accordingly, even under § 1404(a), transfer is required. There is no discretion to ignore the parties' forum selection clause in this case.

C. The Fifth Circuit's Judgment Must Be Reversed

Atlantic Marine and J-Crew agree that a mandamus petition to the court of appeals was the correct, "generally accepted" procedure to obtain appellate review of an erroneous decision denying a motion to transfer venue. (*See* Opp. at 8). The Fifth Circuit denied Atlantic Marine's mandamus petition based on the errors of law discussed above. When the correct rules are applied, the conclusion is clear—the district court had a duty to dismiss this case or, alternatively, to transfer it to Virginia. This Court should reverse the Fifth Circuit's judgment and remand this case for further proceedings applying the correct legal rules. *See, e.g., Cheney v. U.S. District Court for District of Columbia*, 542 U.S. 367, 371 (2004) (resolving disputed issue of law then remanding for consideration of the right to mandamus relief in light of the Court's decision); *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2330-31 (2011) (same).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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June 17, 2013

RESPONDENT'S BRIEF

No. 12-929

RECORD AND BRIEFS

Supreme Court, U.S. FILED

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IN THE

Supreme Court of the United States

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT J-CREW MANAGEMENT INC.

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QUESTIONS PRESENTED

1. Does this Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) require federal courts sitting in diversity jurisdiction to apply 28 U.S.C. § 1404(a) to determine the enforceability of a forum-selection clause selecting an alternate federal forum?

2. If so, how should district courts allocate the burden of proof among parties seeking to enforce or to avoid a forum-selection clause?

PARTIES TO THE PROCEEDING

The following identifies all of the parties before the United States Court of Appeals for the Fifth Circuit.

The Petitioner below was Atlantic Marine Construction Company, Inc. ("Atlantic"). The Respondent below was J-Crew Management, Inc. ("J-Crew"). Because this case involves a mandamus action, the United States District Court for the Western District of Texas is also a Respondent.

J-Crew is a privately-owned corporation. It has no parent company, and no publicly held corporation owns 10% or more of its shares.

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INTRODUCTION

Since *M/S Bremen v. Zapata Off-Shore Co. (The Bremen)*, 407 U.S. 1 (1972), forum-selection clauses have become ubiquitous, even in non-maritime contracts. In *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), the Court held that forum-selection clauses designating a federal venue in diversity cases should be evaluated through the prism of 28 U.S.C. § 1404(a),[1] which places judicial restraints on parties' private venue selection. Nevertheless, a number of federal circuit courts allow parties to thwart § 1404(a) by holding that forum-selection clauses render venue "improper" in all but the contractually-specified venue. These courts enforce forum-selection clauses designating a federal venue under Fed. R. Civ. P. 12(b)(3) or § 1406 and reflexively dismiss cases filed in a non-specified venue. This result is directly contrary to the express holding of *Stewart* and, as Judge Higginbotham correctly observed in the Fifth Circuit opinion below, this reasoning would render *Stewart* a "dead letter." Pet. App. 6a n.18.

---

1. All statutory references are to Title 28, United States Code, unless otherwise noted.

STATUTES AND RULES INVOLVED

This case requires an analysis of the following federal venue statutes in Title 28, United States Code:

> **§ 1391. Venue Generally.**
>
> **(a) Applicability of section.**—Except as otherwise provided by law—
>
> (1) this section shall govern the venue of all civil actions brought in district courts of the United States; and
>
> ***
>
> **(b) Venue in general.**—A civil action may be brought in—
>
> ***
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
>
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

§ 1404. Change of Venue.

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

§ 1406. Cure or Waiver of Defects.

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

This case also raises an issue under Rule 12 of the Federal Rules of Civil Procedure:

12(b) How to Present Defenses.

Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

***

3) improper venue;

***

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed.

STATEMENT OF THE CASE

This fact-intensive, $159,000 dispute arises out of a contract between Atlantic—a federal contractor—and J-Crew, a subcontractor Atlantic hired to build a day care center at Fort Hood, in Killeen, Texas. J.A. 7–11.

After J-Crew completed its work on the day care center, Atlantic refused to pay the remaining balance of the subcontract, claiming that the work performed by J-Crew's sub-subcontractors, who are not parties to this suit, did not conform to the project's plans and specifications, or was untimely. J.A. 82–83 at ¶¶ 6–7. J-Crew then filed this diversity action against Atlantic in the Western District of Texas to collect the $159,000 balance of the contract. J.A. 7–15.

One of the dispute resolution clauses in the parties' subcontract stated,

> [T]hat all . . . disputes . . . shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division. The Parties hereto expressly consent to the jurisdiction and venue of said courts. J.A. 28.

In response to J-Crew's complaint, Atlantic filed a Motion to Dismiss pursuant to § 1406 and Fed. R. Civ. P. 12(b)(3). Atlantic's Motion was based exclusively on the parties' forum-selection clause.[2] J.A. 49–55. Relying on this Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), the district court denied Atlantic's Motion to Dismiss. The district court held that venue was proper in the Western District of Texas under § 1391(b)(2), and that the forum-selection clause's enforceability should be determined pursuant § 1404(a), rather than § 1406 or Rule 12(b)(3). Pet. App. 32a–35a.

Atlantic also filed an alternative Motion to Transfer Venue pursuant to § 1404(a), J.A. 49–55. Pet. App 43a. The district court concluded that the private- and public-interest factors encompassed by § 1404(a) militated against transfer to Virginia, Pet. App. 40a, and therefore denied Atlantic's § 1404(a) Motion to Transfer.

In reaching this decision, the district court gave significant—but not dispositive—weight to the parties' forum-selection clause. Pet. App. 39a. As required by § 1404(a), the district court also considered a number of other factors primarily relating to the "practical problems that make trial of a case easy, expeditious and inexpensive," Pet. App. 36a n.2, together with the public interest in having local disputes resolved locally. Pet. App. 40a.

---

2. Atlantic's Motion to Dismiss, as it related to the forum-selection clause, was premised only upon 28 U.S.C. § 1406 and Fed. R. Civ. P. 12(b)(3)—not Rule 12(b)(6). J.A. 48.

Under these criteria, the only significant factor favoring transfer to Virginia was the parties' agreement.[3]

In contrast, a wide array of factors undermined Atlantic's transfer attempt:

(1) All of the evidence of J-Crew's allegedly defective work (indeed, the entire project) is located in Texas (J.A. 81-82 at ¶ 3; Pet. App. 38a);

(2) All of J-Crew's witnesses, and all of Atlantic's witnesses who worked on the construction site, are in Texas and have no relationship to the Eastern District of Virginia (J.A. 82 at ¶¶ 5-6, 56-57 at ¶ 2; Pet. App. 37a-39a);

(3) The anticipated non-party witnesses specifically identified by J-Crew (Pace Painting, L.L.C.; Norman Woodworks, L.L.C.; Architectural Division 8, Inc.; Killeen Overhead Doors, Inc.; Ponder Company, Inc.; The Blind Shop; and Newman Sports Flooring) all reside in Texas (J.A. 82 at ¶ 5; Pet. App. 38a);

(4) The non-party witnesses in Texas cannot be compelled to testify in Virginia (Pet. App. 38a);[4]

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3. Although Atlantic claimed that its books and records were in Virginia, all of its witnesses who worked on the site are in Texas and have no relationship to the Eastern District of Virginia. J.A. 56–57, 82 at ¶¶ 5-6; Pet. App. 37a–39a. Regarding the books and records, the district court concluded that inconvenience of transporting Atlantic's records was "minimal." Pet. App. 39a.

4. *See* Fed. R. Civ. P. 45(c)(3).

(5) Atlantic could not identify a single non-party witness who would be inconvenienced by the case being heard in Texas (Pet. App. 39a);

(6) The Western District of Texas is more familiar than the Eastern District of Virginia with governing substantive Texas contract law (Pet. App. 40a); and

(7) The construction project underlying the dispute is of greater interest to the people of Texas than to the people of Virginia because the project is in Texas. Pet. App. 40a.[5]

Based on these facts, and its conclusion that § 1404(a) provided the proper adjudicative framework, the district court denied Atlantic's alternative Motion to Transfer. Pet. App. 40a.

Atlantic then filed a Petition for Writ of Mandamus from the Fifth Circuit Court of Appeals, seeking to compel the district court to dismiss or transfer the case to the Eastern District of Virginia. Pet. App. 2a. The Fifth Circuit, also relying on *Stewart*, held that § 1404(a) was the

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5. In addition to Texas' undeniable interest in disputes on construction projects in Texas involving Texas subcontractors, tradesmen, and suppliers, Texas has expressed a strong preference in having its construction disputes decided locally. Texas Business & Commerce Code § 272.001, which applies to contracts for the improvement of real property located within the State of Texas, provides: "If a contract contains a provision making the contract or any conflict arising under the contract subject to another state's law, litigation in the courts of another state, or arbitration in another state, that provision is voidable by the party obligated by the contract to perform the construction or repair."

proper procedural device for enforcing the forum-selection clause and recognized the implicit corollary "that a forum selection clause does not render the venue of an otherwise properly venued claim improper because § 1404(a) is the proper procedural tool for transferring a case only when venue is proper in the chosen district; if venue is improper, § 1406(a) is used to transfer venue." Pet. App. 6a (internal quotation marks omitted).

Judge Higginbotham, writing for the Majority, further reasoned that "private parties should not have the power to transcend federal venue statutes that have been duly enacted by Congress and render venue improper in a district where it otherwise would be proper under congressional legislation." Pet. App. 6a. The Fifth Circuit unanimously denied Atlantic's Petition, holding that the district court did not "clearly and indisputably" err in its decision. Pet. App. 13a.

Atlantic then petitioned this Court for a Writ of Certiorari to review the Fifth Circuit's judgment.

ARGUMENT

District courts are not bound by the desires of private parties in determining the manner in which they adjudicate disputes, but rather they are bound by Congress and by this Court's precedent to consider additional factors so that the interests of justice are served. More specifically, this Court in *Stewart* held that 28 U.S.C. § 1404(a) governs a district court's decision whether to give effect to a forum-selection clause designating a federal venue. *Stewart*, 487 U.S. at 32.

Atlantic now contends that the district court "clearly abused its discretion" by following *Stewart* instead of granting Atlantic's Motion to Dismiss for improper venue pursuant to Fed. R. Civ. P. 12(b)(3) and § 1406. The Fifth Circuit, below, correctly observed that whether § 1406 or § 1404(a) applies turns on whether venue is proper in the court in which the suit was originally filed. If venue is improper in that court, then § 1406 or Fed. R. Civ. P. 12(b)(3) applies. If venue is proper in that court, then § 1404(a) applies. Pet. App. 6a.[6] The district court correctly found venue proper in the Western District of Texas, applied § 1404(a) to this venue dispute, and denied Atlantic's motions.

I. VENUE IS PROPER IN THE WESTERN DISTRICT OF TEXAS.

The United States Constitution empowers Congress to establish the proper venue for disputes in the federal courts. *Stewart*, 487 U.S. at 32 ("[T]he constitutional provision for a federal court system . . . carries with it congressional power to make rules governing the practice and pleading in those courts." (internal citations omitted)); *United States v. Nat'l City Lines, Inc.*, 334 U.S. 573, 588–89 (1948) ("Congress' mandate regarding venue and the exercise of jurisdiction is binding upon the federal courts."). Congress exercises this authority through an intricate and reasoned statutory scheme in which "venue" is defined as "the geographic **specification of the *proper***

6. "Under current law, district courts may transfer cases to other district courts where venue is proper either if the transferee court is more convenient (28 U.S.C. § 1404) or if venue is improper in the transferor court (28 U.S.C. § 1406)." H.R. Rep. No. 104-798, at 32 (1996).

court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts . . . ." 28 U.S.C. § 1390(a) (emphasis added). The "proper" venue for resolution of parties' disputes is then specified in § 1391(a). *See* 28 U.S.C. § 1391(a) ("Except as otherwise provided by law—this section **shall govern** the venue of **all civil actions** brought in district courts of the United States.") (emphasis added).

Atlantic does not, and cannot, dispute that venue in the Western District of Texas is statutorily proper under § 1391(b). The construction work at issue is physically located in the Western District of Texas, as are the seven non-party sub-subcontractors, suppliers, and tradesmen who performed the work. J.A. 81–82 at ¶¶ 3–5. Atlantic's own witnesses with relevant knowledge of the project are themselves located in the Western District of Texas. Pet. App. 37a. Venue is therefore statutorily proper in the Western District of Texas. *See* 28 U.S.C. § 1391(b)(2) (setting proper venue in any "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . .").

Atlantic nevertheless insists that private parties can disregard the intricate venue statutes enacted by Congress and render venue "improper" or "wrong" by private agreement. Private parties do not possess such power. The Fifth Circuit, below, joined the Second, Third, Sixth, and Seventh Circuits[7] in recognizing this

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7. *Red Bull Assocs. v. Best W. Int'l, Inc.*, 862 F.2d 963, 967 (2d Cir. 1988) ("The other component of the analysis—the interest of justice—is not properly within the power of private individuals to control. The existence of a forum selection clause cannot preclude the district court's inquiry into the public policy ramifications of

fundamental principle first articulated by Justice Scalia in *Stewart*: "[W]hile the parties may decide who between them should bear any inconvenience, only a court can decide how much weight should be given under § 1404(a) to the factor of the parties' convenience as against other relevant factors such as the convenience of witnesses." *Stewart*, 487 U.S. at 35 (Scalia, J., dissenting on other grounds).

II. PRIVATE PARTIES CANNOT RENDER STATUTORILY PROPER VENUE IMPROPER.

Congress intended that § 1404(a) "place discretion in the district court to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness." *Stewart*, 487 U.S. at 29. The command that venue within the federal courts be determined on a case-by-case basis limits the extent to which private parties, even through a freely-bargained contract, are permitted to refashion the laws of federal procedure that specify where a suit may be brought. 14D Charles A. Wright, et al., *Federal Practice and Procedure* § 3803.1 (3d ed. 2013).

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transfer decisions."); *In re Atl. Marine Constr. Co., Inc.*, 701 F.3d 736, 740 (5th Cir. 2012); *In re LimitNone, L.L.C.*, 551 F.3d 572, 575–76 (7th Cir. 2008) ("Because the Northern District of Illinois was not an improper venue, § 1404(a), rather than § 1406(a), provided the authority for the transfer order."); *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 830 (6th Cir. 2009); *Kerobo v. Sw. Clean Fuels Corp.*, 285 F.3d 531, 535 (6th Cir. 2002); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995). *But cf. TradeComet.com L.L.C. v. Google, Inc.*, 647 F.3d 472, 478 (2d Cir. 2011).

A. The Court Cannot Permit Deviation from the Congressionally-Mandated Framework.

Congress directs that § 1391 "**shall govern** the venue of **all** civil actions brought in district courts of the United States." 28 U.S.C. § 1391(a) (emphasis added). The use of "shall" in 28 U.S.C. § 1391 signals Congress's intent that venue be determined solely by statute. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (noting that "shall" is a mandatory term, "which normally creates an obligation impervious to judicial discretion"); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Atlantic has identified no statutory exception providing private parties the power to disregard Congressionally-mandated venue statutes through contracts. The reason is simple: no exception exists. Atlantic's argument would require the Court to create a novel judicial exception to § 1391, effectively rewriting the statute to read "this section shall govern the venue of all civil actions brought in district courts of the United States, **unless the parties otherwise agree.**" There is no evidence that Congress ever intended to give private parties such control.

Atlantic, unable to squeeze within the framework of § 1391, instead offers an overly-broad interpretation of the term "wrong" under 28 U.S.C. § 1406—one that renders venue "improper" in any district other than the venue agreed to by private parties. To support its position, Atlantic relies upon the definition of "wrong" found in Black's Law Dictionary: "[a] breach of one's legal duty" or the "violation of another's legal right." Br. 15 citing *Black's*

Law Dictionary 1751 (9th ed. 2009). This definition, and the circular reasoning that surrounds it, cannot salvage Atlantic's argument. Br. 14–15.

Atlantic, ignoring *Stewart*, starts with the premise that private parties have an absolute right to contractually determine the "right" or "proper" venue and then concludes that any other venue is "wrong." This analysis, however, sidesteps the central issue: whether private parties have a legal right to determine the venue of a dispute in federal court exclusively by contract. This Court's holding in *Stewart* provides the answer: they do not.[8]

B. *Stewart* Requires District Courts to Evaluate Forum-Selection Clauses Through the Prism of § 1404(a).

"We hold that federal law, specifically 28 U.S.C. § 1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause and transfer this case to [the district designated in the parties' contract]." *Stewart*, 487 U.S. at 32. This case presents the precise set of circumstances confronted by the Court in *Stewart*: a diversity case filed in a statutorily proper venue pursuant to 28 U.S.C. § 1391, but contrary to a forum-selection clause designating an alternative federal district as the venue for any disputes. There, this Court held that the factors provided for in § 1404(a) governed the enforceability of the forum-selection clause. *Id.* Atlantic has not provided a compelling reason to depart from this established precedent.

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8. The *Black's Law Dictionary* definition of "wrong" is still even less relevant, as it defines "wrong" only as a noun. Congress uses "wrong" in § 1406(a), however, as an adjective to describe the venue in which a case is filed.

1. *Stewart* is Explicit in Its Mandate that § 1404(a) Controls the Enforcement of Forum-Selection Clauses.

The Fifth Circuit correctly noted that the "core of *Stewart* is the directive of Congress that allocation of matters among the federal district courts is not wholly controllable by private contract." Pet. App. 13a. Atlantic nevertheless seeks to minimize the dispositive effect of this Court's opinion in *Stewart* by arguing that the Court's holding is limited to the issue of the supremacy of federal law. In doing so, Atlantic sidesteps the basis of this Court's analysis—that § 1404(a) specifically governs the enforcement of forum-selection clauses designating a federal venue. Br. 10, 22–24. But *Stewart's* command is clear and should not be ignored:

> Section 1404(a) directs a district court to take account of factors other than those that bear solely on the parties' private ordering of their affairs. The district court also must weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of the 'interest of justice.' It is conceivable in a particular case, for example, that because of these factors a district court acting under § 1404(a) would refuse to transfer a case ***notwithstanding the counterweight of a forum-selection clause*** . . . .

487 U.S. at 30–31 (emphasis added).

Moreover, if Atlantic is correct that a forum-selection clause renders venue "wrong" or "improper" in any district other than the one designated by the parties, then the very foundation of this Court's holding in *Stewart*—that 28 U.S.C. § 1404 was a valid Congressional act specifically addressing enforcement of the forum-selection clause at issue and pre-empting state law—falls apart. *Stewart*, 487 U.S. at 28, 32 ("Applying the above analysis to this case persuades us that federal law, specifically 28 U.S.C. § 1404(a), governs the parties' venue dispute.").

2. This Court's Decision in *Stewart* Does Not Conflict with its Prior Decision in *The Bremen*.

Atlantic's argument is premised upon a faulty assumption: that this Court articulated the proper mechanism to enforce forum-selection clauses designating an alternative federal forum before the Court's seminal decision in *Stewart*. The Court did not. *M/S Bremen v. Zapata Off-Shore Co. (The Bremen)*, 407 U.S. 1 (1972) articulated a presumption of validity for forum-selection clauses in international maritime agreements;[9] it did not address the limits Congress imposed on the parties' ability to contractually determine the propriety of venue within the federal courts. *Stewart* was the Court's first opinion directly addressing the procedural mechanism that should be used to determine the enforceability of forum-selection clauses specifying a federal venue, and it continues to be

9. The Court recently affirmed this view in *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2448 (2010) (enforcing forum-selection clause where "[t]he parties sensibly agreed that because their bills were governed by Japanese law, Tokyo would be the best venue for any suit relating to the cargo").

good law. Accordingly, § 1404(a) continues to be the proper procedural mechanism for enforcing a forum-selection clause selecting an alternative federal forum. *Stewart*, 487 U.S. at 28, 32.

Moreover, *The Bremen* arose from a motion to dismiss based on lack of jurisdiction or on forum non conveniens grounds—not for "improper" or "wrong" venue. 407 U.S. at 4; *see also Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1955) ("The forum non conveniens doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else."). *Stewart*, in contrast, arose from a motion to dismiss under § 1406, or alternatively to transfer venue pursuant to § 1404—precisely the same motion filed by Atlantic in this case. Simply stated, *The Bremen* did not address whether or not venue was proper within the federal courts.

3. The Federal Courts Jurisdiction and Venue Clarification Act of 2011 Resolved Any Doubt as to the Proper Method for Enforcing Forum-Selection Clauses.

Congress directs that multiple considerations govern transfer within the federal court system, placing discretion with the district courts to make this determination on an individualized, case-by-case basis. *Stewart*, 487 U.S. at 35. This has been the law for 25 years, and the Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("Venue Act") reaffirms this view. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63,

125 Stat. 758; H.R. Rep. No. 112-10, at 24 (2011). Atlantic may be disappointed with the balance struck by Congress in the Venue Act, but the arguable benefits of Atlantic's suggested bright-line rule do not provide a legitimate basis for disregarding Congress's authority to define the proper venue for disputes within its courts.

Atlantic mistakenly seeks refuge in the recent amendments Congress made to § 1404(a) which allow district courts to transfer cases filed initially in a proper venue "to any district or division to which all parties have consented." Br. 11 n.3. Atlantic suggests that Congress intended this amendment to provide parties more flexibility in chosing the venue for resolution of their dispute. Br. 11 n.3. While allowing private parties increased flexibility in venue selection may have been one goal of the § 1404(a) amendment, the legislative history confirms that Congress did not intend to supplant this Court's holding in *Stewart*: that a private party's choice of forum is but one factor for the district court to consider when ensuring that the interests of justice are best served by a particular federal venue.

The House Report to the Venue Act reaffirms that Congress expects district courts to determine whether transfer is warranted on a case-by-case basis, and that the parties' expressed venue preference is only one consideration. In a particularly telling passage, Congress stated "[u]nder the proposed amendment, such transfers would only be possible where [1] all parties agreed ***and*** [2] *only if the court found it to be for the convenience of the parties and witnesses and in the interest of justice.*" H.R. Rep. 112–10, at 24 (2011) (emphasis added). Thus, while Atlantic urges that the enforcement of forum-

selection clauses should not be subject to considerations of "discretionary rules," including convenience of witnesses and the interests of justice, those are precisely the criteria Congress mandates that district courts employ.

Congress's amendment to § 1404(a) does not empower private parties to render venue improper; the propriety of venue is established by § 1391. That amendment, however, does provide courts with statutory authority to approve transfer of a case to an agreed-upon venue. Notably, Congress made numerous amendments to § 1391 in the Venue Act and easily could have provided that a civil action "may be brought . . . in any district or division to which all parties have consented." Alternatively, Congress could have crafted a special exception to the general venue statute, just as it carved out exceptions for removal or maritime actions in § 1390. 28 U.S.C. § 1390(b)–(c); *see Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."). As a third option, Congress could have set forth a special provision within § 1391 to provide that venue would be ***exclusive*** in a district where all parties have agreed. Ultimately, however, it chose not to do so. [10]

10. Notably, Congress did not make a parallel amendment to § 1406 permitting transfer of a case laying venue in the wrong division or district to "any district or division to which all parties have consented;" rather, an "improper" court still may only transfer the case to a "district or division in which [the civil action] could have been brought." 28 U.S.C. § 1406.

Similarly, Congress has not imbued forum-selection clauses with the same forceful, conclusive effect imparted to arbitration agreements. Congress could have adopted a rule favoring enforcement of forum-selection clauses as it has with arbitration provisions. 9 U.S.C. § 2 ("A written provision in any [contract] evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). It chose not to do so, instead opting for a flexible case-by-case approach. The fact remains that district courts retain an interest in determining the most efficient and just location within the federal system for cases to be to litigated and decided, unlike when parties select arbitration.

The venue amendments reflect Congress's delicate balancing of multiple concerns: private parties' desire for certainty in their business transactions and potentially countervailing concerns for systemic integrity and the interests of justice. *Stewart* instructs that the parties' forum-selection clause should be given significant weight, as it was in this case; however, even the expanded ability of private parties to contractually determine venue through a forum-selection clause remains subject to the district court's oversight. The core principle of *Hoffman v. Blaski*—that private parties cannot control whether venue is "proper" or "improper"—continues to control. 363 U.S. 335, 344 (1960).

Stewart has served as established precedent for a quarter of a century. Setting it aside now would require a "special justification" beyond a bare belief that it was

wrong. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). Moreover, "a party seeking to overturn a *statutory* precedent bears an even greater burden, since Congress remains free to correct the Court's decision . . . ." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1446 (2010). The Venue Act reaffirms that Congress has no intention of disturbing this Court's interpretation of § 1404(a) and its application to forum-selection clauses selecting a federal forum. Accordingly, Atlantic faces an exceedingly difficult burden to justify a departure from this Court's settled law, which mandates that § 1404(a) govern the enforcement of forum-selection clauses designating a federal venue as the parties' chosen forum—another burden that Atlantic cannot meet. *Stewart*, 487 U.S. at 25–26.

4. Atlantic's Argument Leads to Absurd Results.

Atlantic's assertion that private parties could render statutorily proper venue "improper" would do extensive and unnecessary violence to the intricate procedural framework that governs the federal courts. A district court's authority to transfer a case, *sua sponte*, to a more appropriate forum in the interests of justice is well-settled. *See Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1336 (11th Cir. 2011) (holding that a district court may *sua sponte* transfer a civil action to any other district where it might have been brought if doing so will be convenient for the parties and witnesses and serve the interest of justice.).

The court's authority to transfer a case *sua sponte* is derived from § 1404(a) and § 1406, which allow district courts to transfer a matter "to any other district or

division where it might have been brought." 28 U.S.C. § 1404(a); 28 U.S.C. § 1406. If a forum-selection clause renders every district "improper" except the venue selected by the parties, then the district court would be impotent to transfer a case to a more appropriate forum in the interests of justice. Neither Congress nor established case law empowers private parties with this sweeping command over the courts. Private parties are free to negotiate contracts within the bounds of the law and to allocate any inconvenience of litigation among themselves. Private parties cannot, however, divest district courts of their Congressionally-vested discretion and handcuff the judiciary in the administration of justice.

III. THE DISTRICT COURT PROPERLY APPLIED § 1404(a).

A. The District Court Properly Determined that the Balancing of § 1404(a) Factors Weighed Decidedly in Favor of Retaining Venue in the Western District of Texas.

Atlantic seeks to transform the district court's unremarkable denial of its motion to transfer venue into a monumental miscarriage of justice warranting extraordinary relief. A review of the district judge's order, however, reveals that the court's decision was the result of a reasoned and balanced analysis that gave appropriate consideration to Atlantic's forum-selection clause in accordance with 28 U.S.C. § 1404(a) and this Court's opinion in *Stewart*. Pet. App. 13a ("The district court was plainly conversant with *Stewart*.").

Although the presence of a forum-selection clause is a "significant factor that figures centrally in the district court's calculus," it is not entitled to dispositive consideration. *Stewart*, 487 U.S. at 29–31. Rather, a forum-selection clause is entitled only to "the consideration for which Congress provided in § 1404(a)." *Id.* at 31. While Atlantic contends that the district court's inquiry should begin—and end—with the parties' forum-selection clause, *Stewart* and 28 U.S.C. § 1404(a) mandate that a district court account for factors other than those that bear solely on the parties' private affairs.

The district court conducted a thorough analysis of the private and public interest factors that it was bound to consider by this Court's precedent. Specifically, the district judge considered the forum-selection clause in the parties' contract, the location of Atlantic's books and records, and Atlantic's argument that the Eastern District of Virginia disposes of cases, on average, 2.3 months faster than the courts of the Western District of Texas. The court then balanced these factors against the expense and inconvenience to at least seven non-party witnesses (applying the "100-mile rule" set forth by the Fifth Circuit in *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 317 (5th Cir. 2008)), the problems with securing compulsory process over key witnesses to attend trial, the efficiency in conducting discovery, the Western District's relative familiarity with Texas law, and the importance of the litigation to the people of the Western District of Texas. Critically, the district court's opinion did not consider the inconvenience or expense *to J-Crew* at all, as J-Crew never raised its own convenience in support of its response. Weighing these competing factors, the district

court concluded that the matter should not be transferred to Virginia.[11]

Atlantic now asks this Court to adopt a policy, which it ascribes to *The Bremen*, of reflexively enforcing forum-selection clauses in all diversity cases, absent a showing of fraud or overreaching. Br. 13. This Court expressly rejected the *Bremen* standard in the exact same context. *Stewart*, 487 U.S. 22, 28–29 ("[W]e disagree with the court's articulation of the relevant inquiry as 'whether the forum-selection clause in this case is unenforceable under the standards set forth in *The Bremen*.'"). Such a standard would also contravene this Court's admonishment that forum-selection clauses are not entitled to dispositive consideration. *Id.* at 31.[12]

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11. In affirming the district court's analysis, Judge Higginbotham noted that "[d]ismissal under Rule 12(b)(3) or transfer under § 1406 would deny district courts both a role in making the transfer and its capture of Texas law. While Atlantic Marine bargained for a choice of forum, it failed to obtain a choice of law provision." Pet. App. 6a.

12. In her concurring opinion, Judge Haynes posited that "[h]ad the district court given the forum-selection clause the deference it deserves, it would have transferred the case under either § 1404 or § 1406." Pet. App. 24a. J-Crew submits that under the facts of this case, a decision to transfer could only be reached by giving the forum-selection clause dispositive weight: a result that cannot square with *Stewart*.

B. This Case Presents an Exceptional Set of Circumstances.

Atlantic and the Chamber of Commerce speculate that a parade of horribles will result if forum-selection clauses are not reflexively enforced. But neither § 1404(a) nor this Court's decision in *Stewart* prevent a court from deciding that the parties' contractual agreement, with its emphasis on party autonomy and the fulfillment of commercial expectations, best serves the "convenience of the parties" and the "interest of justice." J-Crew concedes that this will be the result in most cases, as the significant weight accorded to the parties' forum-selection clause will prevail.

This case, however, stands apart from other contract disputes that do not lend themselves to resolution in any specific district and that typically will be decided by party witnesses. The evidence before the district court revealed the exceptional nature of this case: all of the physical evidence is located in and cannot be removed from the Western District of Texas; significant expense and inconvenience to at least seven non-party witnesses would be incurred; serious problems with securing compulsory process over key witnesses to attend trial would be present; concerns over efficiency in conducting discovery that threaten to plague the case; a lack of familiarity with Texas law would lead to inefficient results; and the importance of the litigation to the people of the Western District of Texas would be diminished. Most importantly, this case is unique in that Atlantic's own witnesses with relevant information are themselves located in the Western District of Texas, yet Atlantic still seeks to evade the

courts of that district and transfer the matter to Virginia. J.A. 56–57 at ¶ 2; Pet. App. 37a ("Atlantic concedes that the members of its project-magement team that work on the construction site do not reside in Virginia.").

C. The Burden is on Atlantic, as Movant, to Show Transfer is Warranted Under § 1404(a).

Atlantic, as movant, bore the burden to show transfer was warranted. *Hoffman v. Blaski*, 363 U.S. 335, 366 (1960). The private and public interest factors weigh so decidedly in favor of venue in the Western District of Texas that J-Crew would overcome any burden placed on J-Crew. Consequently, any decision by this Court, regardless of who bears the burden under § 1404(a), will not affect the appropriate venue for this dispute.

1. The Circuit Courts are in Agreement as to the Burden Under § 1404(a).

Atlantic correctly states that the Third and Eleventh Circuits shift the burden in a § 1404(a) analysis to the party seeking to avoid transfer. Conversely, the Fifth and Ninth Circuits place the burden on the movant to demonstrate that transfer is warranted pursuant to § 1404(a), despite the existence of a valid forum-selection clause. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 499 (9th Cir. 2000), *cert. denied*, 531 U.S. 928 (2000). All of these circuits, however, still follow *Stewart* and recognize that forum-selection clauses be given "significant" weight in determining whether to transfer pursuant to § 1404(a).

Critically, the reason the Eleventh Circuit "shifted" the burden to the party opposing enforcement of the forum-selection clause was that the presence of a valid forum-selection clause eliminates the traditional deference given to a plaintiff's choice of forum. *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989). Neither the Fifth Circuit nor the district court in this case attributed *any* deference to J-Crew's selected forum. Instead, the district court gave the forum-selection clause "significant" weight as directed by *Stewart*. Still, the court found the forum-selection clause was outweighed by the other private and public factors applicable in the § 1404(a) analysis. Pet. App. 39a. While the more appropriate articulation of the standard is that the movant continues to bear the burden of demonstrating that transfer is warranted, the practical effect remains the same regardless of how the burden is articulated.

2. The District Court Properly Placed the Burden on Atlantic to Justify Transfer.

The district court properly held that Atlantic, as movant, bore the burden of establishing the propriety of transfer pursuant to 28 U.S.C. § 1404(a). Pet. App. 9a–10a. The Court in *Stewart* directed that forum-selection clauses receive significant but not dispositive attention:

> The forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a).

Stewart, 487 U.S. at 31.[13] As the Fifth Circuit explained, "[p]lacing the burden on the moving party still allows the court to give the forum-selection clause 'the consideration for which Congress has provided in § 1404, because the district court will consider the forum-selection clause in evaluating both the private and public interest factors.'" Pet. App. 10a.

While the presence of the forum-selection clause may be a "significant factor," as many courts have observed, Atlantic offers no basis beyond *The Bremen* standards, which were considered and rejected by this Court in the context of a § 1404(a) analysis, for shifting the burden of proof or persuasion. *Stewart*, 487 U.S. at 28–29 ("Although we agree with the Court of Appeals that the *Bremen* case may prove 'instructive' in resolving the parties' dispute . . . we disagree with the court's articulation of the relevant inquiry as 'whether the forum-selection clause in this case is unenforceable under the standards set forth in *The Bremen*.'"). As Congress reaffirmed in the legislative history to the Venue Act, "transfers [are] only [ ] possible where all parties agreed ***and*** *only if the court found it*

13. "The presence of a forum-selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the district court's calculus. In its resolution of the § 1404(a) motion in this case, for example, the district court will be called upon to address such issues as the convenience of the selected forum given the parties' expressed preference for that venue, and the fairness of transfer in light of the forum-selection clause and the parties' relative bargaining power. The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. at 29–30.

to be for the convenience of the parties and witnesses ***and*** *in the interest of justice.*" H.R. Rep. No. 112-10, at 24 (2011) (emphasis added). Thus, the movant still bears the burden to satisfy the district court not only that the parties agreed upon a federal venue, but also that transfer be for the *convenience of the parties and witnesses* ***and*** *in the interest of justice.*

3. The Western District of Texas is the Proper Venue for this Dispute Regardless of the Burden.

Even if the forum-selection clause shifted the burden to J-Crew, the balance of the private and public interest factors weigh so decidedly in favor of retaining venue in the Western District of Texas that the initial allocation of the burden will not affect the result in this case.

Atlantic erroneously concludes that the district court's decision was a result of its placing the burden on Atlantic. Br. 27. It was not. A fair reading of the court's opinion clearly shows that the district court concluded that the private and public interest factors overwhelmingly pointed to the Western District of Texas as the appropriate venue for this dispute. Pet. App. 39a–40a.

Nevertheless, Atlantic insists that if the burden had been placed on J-Crew, the district court would have reached a different result. Br. 25–9. Tellingly, Atlantic omits any discussion of relevant factors that would compel a different result had the burden "shifted" to J-Crew. Both J-Crew and Atlantic submitted affidavits to the district court to aid in analyzing the propriety of transfer under § 1404(a). The facts before the district court included, among

others, the forum-selection clause itself, the inconvenience to the non-party witnesses specifically identified by J-Crew, and the fact that the construction project is of far greater significance to the people of the Western District of Texas than it is to the people of Virginia. Pet. App. 36a–40a. The only way to reach the result sought by Atlantic would be to attribute "dispositive weight" to Atlantic's forum-selection clause—a standard expressly rejected by this Court in *Stewart*—before transfer to the Eastern District of Virginia could be justified. *See Stewart*, 487 U.S. at 31 (noting that forum-selection clauses are not entitled to dispositive weight).

D. The Fifth Circuit Correctly Refused to Disturb the District Court's Discretion.

This Court has admonished that a writ of mandamus is an extraordinary remedy, to be granted only in extreme cases where a petitioner's "right to issuance of the writ is clear and indisputable." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380–81 (2004). Atlantic failed to overcome this high hurdle to obtaining a writ of mandamus. The Fifth Circuit correctly held neither the district court's denial of Atlantic's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406 nor its denial of Atlantic's Motion to Transfer Venue pursuant to 28 U.S.C. § 1404(a) was in error—let alone the "clear and indisputable" error required to justify a writ of mandamus.

Indeed, even Judge Haynes, while diverging from the Fifth Circuit majority's analysis, adhered faithfully to this Court's standards for mandamus relief, recognizing that Atlantic failed to meet its burden and joining in the majority's core holding. Pet. App. 14a ("I cannot credibly

contend that the right to the writ is 'clear and indisputable' as required for mandamus relief.").

Equally significant, the issuance of a writ of mandamus is a matter vested in the discretion of the court to which the petition is made—in this case, the Fifth Circuit Court of Appeals. *Cheney*, 542 U.S. at 391. Indeed, even if the district court had erred—which it did not—mandamus would only be appropriate if the district court's holding produced "patently erroneous results." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 312 (5th Cir. 2008) ("[The Court will] review only for clear abuses of discretion *that produce patently erroneous results*.") (emphasis added). Retaining venue in the Western District of Texas, where the relevant party witnesses are located, where at least seven non-party witnesses are located, where the physical evidence is located, where the forum state has expressed a strong interest in deciding disputes arising from local construction projects, where the district judge found Atlantic's own witnesses with material information to be located, and where the burden on the trial court would be minimized—in short, where the interests of justice are best served—is not a "patently erroneous result."

It has long been recognized that "[t]he determination [of] whether the circumstances warrant transfer of venue is peculiarly one for the exercise of judgment by those in daily proximity to these delicate problems of trial litigation." *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966) (internal quotations omitted); *Lykes Bros. S.S. Co. v. Sugarman*, 272 F.2d 679, 680 (2d Cir. 1959). The district court exercised that judgment in this case and, after conducting a balanced and reasoned analysis of the relevant factors, concluded that the Western District of

Texas was the most appropriate venue for this dispute. The Court should not now substitute its judgment for that of the district court's, as doing so would invite extraordinary and unending review of ordinary transfer decisions by every district court in the federal system.

IV. THIS COURT SHOULD AFFIRM THE FIFTH CIRCUIT'S DENIAL OF A WRIT OF MANDAMUS.

A. Forum-Selection Clauses Designating a Federal Venue Should be Subject to Judicial Oversight for the Interests of Justice.

Forum-selection clauses are not ordinary contractual provisions because they could interfere with the orderly allocation of judicial business and injure other third-party interests that were not party to the contractual decision-making process. *Nw. Nat'l. Ins. Co. v. Donovan*, 916 F.2d 372, 376 (7th Cir. 1990).

The choice between how federal courts sitting in diversity will enforce forum-selection clauses is clear: either judges will continue to oversee parties' private venue agreements to ensure that the public's interests are protected and the interest of justice is served; or alternatively, the clauses will be reflexively and dogmatically enforced (contrary to Congress's intent), subject only to review for fraud or undue influence.

This Court recognized that Congress enacted § 1404(a) to "place discretion in the district courts to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness" and "those public-interest factors of systemic integrity [ ] that,

in addition to private concerns, come under the heading of 'the interest of justice.'" *Stewart*, 487 U.S. at 23, 30. Section 1404(a) is the only procedural mechanism that is faithful to Congress's mandate. The flexible approach adopted by Congress requiring district courts to evaluate forum-selection clauses on an individualized, case-by-case basis, taking into account considerations of convenience and fairness does not "*limit*" the district court's review of forum-selection clases as Atlantic contends; rather it is the only enforcement approach that provides district courts with any discretion at all. Br. 22.

B. Applying a § 1404(a) Balancing Test will Limit Forum Shopping.

Atlantic and its amici supporters argue that the Court should disregard the venue statues and reflexively enforce forum-selection clauses to prevent forum shopping. But a forum-selection clause is itself an exercise in forum shopping by the party with the most bargaining power. By affirming that the § 1404(a) balancing test governs the enforceability of forum-selection clauses, the Court would reduce—not encourage—forum shopping because it will force parties to consider public interests when drafting forum-selection clauses. This will limit the number of potential forums that may be contractually selected to those actually intended by Congress. It will also reduce efforts by parties to leverage their private bargaining power to undermine the interests of justice.

Forum-selection clauses are valid devices—even under § 1404(a)—for parties to allocate inconvenience among themselves when the most convenient and just location to resolve a dispute is not readily apparent;

however, only a court can decide how much weight should be given to the parties' convenience relative to other § 1404(a) factors, such as the convenience of non-party witnesses. *Stewart*, 487 U.S. at 35 (Scalia, J., dissenting on other grounds).

Finally, Congress—through the Federal Arbitration Act—has provided private parties with the ability to exercise almost complete control over the manner in which their private disputes are decided. Parties may select arbitration and move forward with absolute certainty as to where a dispute will be resolved. Congress has shown that it intends for arbitration agreements to be routinely enforced, and this Court has gone to great lengths to enforce Congress's mandate; however, using a private dispute resolution system does not impose costs on the public. In contrast, taking advantage of the Federal Court system to resolve private disputes imposes costs on the judiciary and the public as a whole. Accordingly, Congress—through venue statutes, such as § 1391 and § 1404(a)—has mandated that private parties consuming public resources must account for the public's interest and those factors of systemic integrity that are beyond private control.

C. Enforcement of Forum-Selection Clauses through Summary Judgment is Untenable.

Professor Sachs, in his brief as Amicus Curiae, correctly notes that proper venue is determined by statute. Sachs Br. at 3–4. Therefore, private parties cannot contractually render a statutorily proper venue improper. Sachs Br. at 9–10. However, Professor Sachs' argument that forum-selection clauses must be raised as an

affirmative defense and enforced via a Rule 12(b)(6) motion to dismiss or a Rule 56 motion for summary judgment is incorrect in light of this Court's decision in *Stewart*. *See* Sachs Br. at 12–15 (arguing that forum-selection clauses must be treated as an affirmative defense).

This Court has directly addressed "the sticky question of which law, state or federal," governs the enforcement of forum-selection clauses by a federal court sitting in diversity jurisdiction. *Stewart*, 487 U.S. at 25–26. This Court held that "federal law, specifically 28 U.S.C. § 1404(a)," controlled the "respondent's request to give effect to the parties' contractual choice of venue . . . ." *Id.* at 28–29. Professor Sachs' proposed solution is therefore untenable in light of this Court's prior precedent mandating that 28 U.S.C. § 1404(a) govern the enforceability of forum-selection clauses.[14]

D. Atlantic's Concerns about Commerce are Overstated.

Atlantic and its supporters overstate the alleged damage that would be inflicted upon our nation's businesses if the Court were to affirm its prior holding in *Stewart*. Circuit Courts have subjected forum-selection clauses providing for an alternate federal venue to the required § 1404(a) analysis ever since this Court's holding in *Stewart*. *See Red Bull Assocs. v. Best W. Int'l, Inc.*, 862 F.2d 963, 967 (2d Cir. 1988); *Jumara v. State Farm*

14. While Professor Sach's proposed solution to enforce forum-selection clauses though summary judgment poses additional concerns, those issues are not properly before the Court. *See Tylor v. Freeland & Kronz*, 503 U.S. 638, 645–46 (1992) (limiting review to the questions presented by the parties and accepted by the Court).

Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995); *In re LimitNone, L.L.C.*, 551 F.3d 572, 575–76 (7th Cir. 2008); *Kerobo v. Sw. Clean Fuels Corp.*, 285 F.3d 531, 535 (6th Cir. 2002). Still, businesses engaged in interstate commerce have managed to flourish over the past 25 years despite the "discretionary" limits imposed by § 1404(a) upon their right to contract for a designated federal venue.

Nevertheless, Atlantic argues that "[t]o relegate enforcement of forum-selection clauses to a discretionary convenience analysis under Section 1404(a), is to invite error and erode the right to contract." Br. 25. But the need for parties to have contractual certainty is not incompatible with the flexible, case-by-case analysis demanded by § 1404(a)—particularly when Congress has expressed a clear intent that district courts retain a discretionary role in evaluating the proper venue in federal diversity cases.

Atlantic and its allies do not seek certainty; rather their goal is to furnish the most powerful economic participants with an unassailable right to select a forum, without any regard for collateral effects this decision may have on the public or the systemic integrity of the judicial system. Congress's decision to subject forum-selection clauses to the individualized, case-by-case review under § 1404(a) does not eliminate certainty; it merely requires that parties consider factors beyond their own desires—including institutional concerns—in selecting a forum. Parties remain free to contract for an agreed-upon forum within the limits prescribed by Congress. The more consideration parties give to these factors at the outset, the more certain they may be that such a clause will be enforced.

Finally, while the analysis differs, the result under § 1404 and § 1406 will be the same in all but the most exceptional cases. Atlantic simply fails to acknowledge that this case, in which every private and public interest factor relevant to a § 1404(a) analysis other than the forum-selection clause itself, favors the Western District of Texas is, in fact, an exceptional case.

CONCLUSION

J-Crew Management, Inc. requests that this Court affirm the Fifth Circuit's refusal to issue a writ of mandamus directing that this case be transferred to the Eatern District of Virginia and reaffirm that *Stewart* remains good law 25 years after this Court first held that § 1404(a) governs the enforcement of forum-selection clauses designating a federal venue.

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REPLY BRIEF

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ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

J-CREW MANAGEMENT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

Supreme Court of the United States

No. 12-929

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

J-CREW MANAGEMENT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

Parties have the right to select the forum for litigation of their disputes: "the contemplated availability of all judicial forums may be reduced to a single forum by contractual specification." *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 671 (2012). That federal statutes may allow for suit in many different forums "does not *guarantee* suit in all competent courts, disabling parties from adopting a reasonable forum-selection clause." *Id.* Where, as here, a forum-selection clause is valid, the district court should enforce it to give the party invoking the clause the benefit of its bargain.

The Texas district court should have either dismissed this case or transferred it to the Eastern District of Virginia. 28 U.S.C. § 1404(a) would not come into play unless and until the case is filed in the proper forum. The judge in Virginia, if the case is filed in federal court, may have the power to transfer, taking into account the bargained for forum and other relevant factors that govern the exercise of the court's discretion under § 1404(a). The fatal error here was that the district court in Texas allowed J-Crew to obtain the benefit of a local forum simply by filing suit in the wrong forum in breach of its contract.

A. Forum Selection Clauses Render Venue "Improper" Under Rule 12(b)(3) and "Wrong" Under § 1406

The majority of federal circuit courts allow parties to enforce a forum selection clause under Rule 12(b)(3) and § 1406. (*See* Pet. Br. at 15-16). That procedure provides an efficient, effective vehicle to enforce contractual rights, but also allows the district court to address those rare cases in which a clause is properly challenged under *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), based on fraud, unconscionability, or overreaching. Rule 12(b)(3) and § 1406 are also the only vehicles that authorize district courts to enforce clauses that select a foreign or state court forum. By using the words "improper" in Rule 12(b)(3) and "wrong" in § 1406, Congress chose words that are broad and flexible enough to address cases like this one where a party files suit in breach of its contract.

J-Crew does not challenge the forum selection clause based on any ground recognized in *Bremen*. Nevertheless, J-Crew and its *amicus* seek to allow a party to secure the benefits of a local, home-court

forum simply by filing suit in the wrong court under the agreement—without any regard to the *Bremen* analysis.

J-Crew's approach of relegating enforcement of forum selection clauses to a discretionary balancing test under 28 U.S.C. § 1404(a) leads to contractual uncertainty and unnecessary litigation about where to litigate. (*See* Brief of the Chamber of Commerce of the United States of America ("Chamber Br.") at 16-17). It also provides no answer regarding how to enforce clauses mandating a foreign or state court forum. By holding parties to the terms of their contracts through a venue analysis under Rule 12(b)(3) and 28 U.S.C. § 1406, this Court will uphold the venue scheme adopted by Congress while simultaneously giving due respect to the rights of contracting parties.

1. The Right to Contract Does Not Conflict with Federal Venue Rules

J-Crew's arguments, like the Fifth Circuit Majority Opinion, are based on the false premise that the right to select a federal forum by contract is in conflict with the federal venue statutes. Since at least the 1930's, this Court has held that venue "though defined by legislation relates to the convenience of litigants and as such is subject to their disposition." *Nierbo Co. v. Bethlehem Shipbuilding Corp., Ltd.*, 308 U.S. 165, 168 (1939). When Congress broadened the scope of the venue statutes in 1948, Congress did not alter this principle.

Since 1948, this Court has repeatedly recognized the right to contract regarding the forum for litigation. *See, e.g., National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964) ("it is settled ... that parties to a contract may agree in advance to submit

to the jurisdiction of a given court"); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (to overcome a forum selection clause, a party must make a "strong showing that it should be set aside."); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (the party challenging the clause bears a "heavy burden of proof"). The Court reiterated that principle as recently as 2012 in *CompuCredit Corp. v. Greenwood.* 132 S.Ct. at 671.

Instead of addressing the precedent recognizing parties' rights to consent to, or contract for, a forum within the federal venue scheme, J-Crew seizes upon language in 28 U.S.C. § 1391(a), which provides "[e]xcept as otherwise provided by law – (1) this section shall govern the venue of all civil actions brought in district courts of the United States." (*See* Resp. Br. at 12). But while federal law governs the determination of venue in federal courts, federal law recognizes and respects private parties' right to agree to a forum by consent.

Where, as here, a plaintiff files suit in a forum in breach of its contract, the district court has a duty to enforce the parties' contractual venue rights by either dismissing the case or transferring it to the forum designated in the contract. *See* FED. R. CIV. P. 12(b)(3); 28 U.S.C. § 1406(a). By contrast, when a lawsuit is filed in the contractually-chosen forum, the district court may consider public interests and the interests of justice to determine whether the case presents exceptional circumstances warranting transfer to another forum.[1] *See* 28 U.S.C. § 1404(a); *see also*

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[1] Atlantic Marine does not contend that private parties have the "absolute right" to control venue by contract. (Resp. Br. at 13). The discretion to transfer a case under § 1404(a) applies to "any civil action" filed in a proper forum. *See* 28 U.S.C. § 1404(a);

Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring).

The circuit court majority approach to venue is the only one that gives effect to the statutes enacted by Congress, this Court's precedent, and the parties' agreement. J-Crew's approach rewards parties that sue in breach of their agreements.

2. *Stewart Does Not Address Rule 12(b)(3) or § 1406*

The majority approach will not render *Stewart* a "dead letter." (Resp. Br. at 1). The primary holding of *Stewart*—that federal law controls the venue analysis in federal courts—is not affected by this case.[2] *See Stewart*, 487 U.S. at 25-32.

This case presents an issue not before the Court in *Stewart*. (*See* Pet. Br. at 22-24). J-Crew does not defend the Fifth Circuit Majority's and WRIGHT & MILLER'S misreading of *Stewart*'s footnote 8. *See* 487 U.S. at 28 n.8. The plain meaning of footnote 8 is that

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see also Ex Parte Collett, 337 U.S. 55, 60 (1949) ("§ 1404(a) of the Code deals with the right to transfer an action properly brought."). But it should be a rare day when the parties' agreement is not enforced. *See Bremen*, 407 U.S. at 15; *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring); *Carnival Cruise Lines*, 499 U.S. at 595.

[2] The American Subcontractors Association ("ASA") notes that many states have adopted legislation giving a home court advantage to local entities working under contracts with out-of-state contractors. (*See* ASA Brief at 4-6, 8, 11-12, 30). ASA's attempt to invoke state law directly conflicts with this Court's decision in *Stewart*. The district court, however, correctly held that no such state statute applies here because Texas lacks authority to regulate commerce at Ft. Hood, a federal enclave. (*See* Pet. 29a-32a (following *Adams v. Calvert*, 396 S.W.2d 948, 949 (Tex. 1965)). J-Crew has not challenged that holding.

the Court did not address whether venue was proper because the parties did not present that dispute for resolution by the Court.[3] *Id; see also Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) (review is ordinarily limited to the questions presented by the parties and accepted by the Court).

Professor Sachs, as *amicus curiae*, offers an alternative approach, to enforce forum selection clauses as an affirmative defense to liability, and not as a matter of venue. (*See* Brief of Professor Stephen E. Sachs as *Amicus Curiae* in Support of Neither Party ("Sachs Br.") at 2). He advocates enforcing forum selection clauses under Rule 12(b)(6), on summary judgment, or if necessary, at trial on the merits. (Sachs Br. at 20-27). Prof. Sachs' view is similar to the one adopted by the First Circuit. *See, e.g., Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 15 (1st Cir. 2009). Although Prof. Sachs supports strict enforcement of contracts, his approach would be less efficient and less effective than Rule 12(b)(3) and § 1406. (*See* Pet. Br. at 18; Sachs Br. at 20-27). Moreover, by elevating the clause to a defense on the merits of a case, his approach leaves no room for a § 1404(a) transfer, not even in an exceptional case. Accordingly, his approach would require *Stewart* to be overruled.

Under the circuit court majority approach, *Stewart's* guidance on the role of forum selection clauses under

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[3] J-Crew's suggestion—that "this case presents the precise set of circumstances confronted by the Court in *Stewart*"—ignores the question presented in *Stewart*, as well as the question reserved in footnote 8. (Resp. Br. at 13). Similarly, J-Crew's reliance on the Second Circuit's decision in *Red Bull Assocs. v. Best W. Int'l, Inc.* (*see* Resp. Br. at 10 n.7) is misplaced. That Court expressly declined to address the question whether venue was improper under Rule 12(b)(3) because the parties did not brief that issue. *See* 862 F.2d 963, 964 n.2 (2d Cir. 1988).

28 U.S.C. § 1404(a) still applies. *Stewart* would apply when a party files suit in the contractually-chosen forum, but the district court has concerns that the interests of justice require litigation elsewhere. *Stewart* also would apply when a defendant delays in asserting its contractual rights, thereby waiving its right to demand dismissal or transfer for improper venue. *See* 28 U.S.C. § 1406(b); FED. R. CIV. P. 12(h)(1). It should not be surprising that less weight would be given to a contractual forum selection clause in cases where the defendant fails to assert, or delays in asserting, its rights. Regardless when *Stewart* may apply, it should require exceptional circumstances and a heavy burden to overcome the contract clause. (Pet. Br. at 24-27).

Contrary to J-Crew's arguments on page 15 of its brief, Atlantic Marine does not contend there is a conflict between *Bremen* and *Stewart*. *Bremen* addresses whether a forum selection clause is valid.[4] *Stewart* addresses the weight to be given a forum selection clause in the limited category of cases in which § 1404(a) controls the venue analysis. *Stewart* does not apply to cases filed in breach of a forum selection clause when the defendant preserves its objection to the venue under Rule 12(b)(3) or § 1406.

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[4] Courts routinely apply *Bremen* to all types of cases, and not just to international maritime disputes. 7 RICHARD A. LORD, WILLISTON ON CONTRACTS § 15.15 at 371 (4th ed. 2010). For cases in federal court, that conclusion is consistent with *Stewart's* holding that federal law should control the venue analysis. *See* 487 U.S. at 25-32. To the extent there is disagreement regarding what law should govern the validity of forum selection clauses, this case is not the proper vehicle to resolve that dispute because J-Crew does not contend the clause at issue is invalid. (*See* Sachs Br. at 29-31).

3. *Rule 12(b)(3) and § 1406 Should Be Enforced According to Their Plain Language*

The plain meaning of Rule 12(b)(3) and § 1406 requires enforcement of a valid forum selection clause. A lawsuit filed in breach of the clause is filed in a venue that is both "wrong" and "improper." (*See* Pet. Br. at 14-16). J-Crew counters that Atlantic Marine's interpretations of the words "wrong" and "improper" are overly-broad. (Resp. Br. at 12). But J-Crew's analysis—limiting enforcement of forum selection clauses to the convenience transfers under 28 U.S.C. § 1404(a)—ignores the plain language Congress chose and would create a void in the law. If forum selection clauses cannot be enforced under Rule 12(b)(3) or § 1406, under what authority could a district court dismiss a case when faced with a contractual clause requiring a foreign or state court forum? J-Crew offers no answer to that question.[5]

J-Crew is also wrong when it argues that Atlantic Marine's approach "leads to absurd results." (Resp. Br. at 20-21). J-Crew claims that, if a forum selection clause makes venue "improper," then a district court could never transfer a case to another forum in the interests of justice. (*Id.* at 21). J-Crew's argument is based on § 1404(a), which allows for a transfer "to any other district or division where it might have been brought." *See* 28 U.S.C. § 1404(a). But J-Crew ignores this Court's explanation that "[t]he 'might-have-been-

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[5] The Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits allow courts to use Rule 12(b)(3) and § 1406 to dismiss cases in favor of state or foreign jurisdiction based on a forum selection clause. (Pet. at 15-16 (citing cases); Pet. App. at 8a).

brought' language of § 1404(a) plainly refers to the similar wording in the related federal venue statutes[.]" *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964). When a party files suit in the proper forum under its contract, a district court has authority under § 1404(a) to transfer the case to another venue authorized by Congress under § 1391, provided that the high standard to override the contractual clause is met.

Following the plain language of Rule 12(b)(3) and § 1406, the district court had a duty to enforce the parties' forum selection clause. The case should have been dismissed or transferred to Virginia. J-Crew cannot strip the Virginia courts of the authority to determine how to handle this case simply by filing suit in Texas in breach of its agreement.

4. The Federal Courts Jurisdiction and Venue Clarification Act Did Not Adopt a Contrary View

J-Crew's argument—that "the Federal Courts Jurisdiction and Venue Clarification Act of 2011 [the "Clarification Act"] resolved any doubt as to the proper method for enforcing forum selection clauses"—is incorrect. (*See* Resp. Br. at 16). J-Crew's argument is based on the Clarification Act's legislative history, not its text. (*See id.* at 16-18). Regardless of the weight (if any) to be given to legislative history, it does not support J-Crew's position.

J-Crew says "the legislative history confirms that Congress did not intend to supplant this Court's holding in *Stewart*," and "[t]he House Report to the Venue Act reaffirms that Congress expects district courts to determine whether transfer is warranted on a case-by-case basis, and that the parties' expressed

venue preference is only one consideration." (*Id.* at 17). But contrary to what J-Crew says, the legislative history does not even mention *Stewart* or the need for a case-by-case analysis. *See* H.R. Rep. 112-10 at 23-24, 2011 U.S.C.C.A.N. 576, 580 & n.17 (2011).

The House Report discusses an amendment to § 1404(a) to reverse the rule established in *Hoffman v. Blaski*, 363 U.S. 335 (1960). *See* H.R. Rep. 112-10 at 23-24, 2011 U.S.C.C.A.N. 576, 580 & n.17 (2011). The amendment does not address the impact of a forum selection clause on motions filed under Rule 12(b)(3) or § 1406.[6] When Congress broadened the role of consent under § 1404(a), it did not reject other vehicles to enforce forum selection clauses such as Rule 12(b)(3) and § 1406. Accordingly, when J-Crew argues that the Clarification Act supports its position, J-Crew is assuming *Stewart* conclusively resolved the issue raised in this appeal, even though the issue was not presented by the parties in *Stewart*.

ASA's argument based on the Clarification Act's amendment of § 1404(a) is equally misguided. (ASA Br. at 10). ASA writes that the amendment: "clarifies ... that in the eyes of Congress, forum selection clauses do not control the initial venue determinations." (*Id.*) But § 1404(a) does not even apply until the "initial venue determination"—whether venue is "improper" or "wrong"—has already been made. *See Ex Parte Collett*, 337 U.S. at 60. An amendment to § 1404(a)'s convenience transfer rule does not alter the analysis of

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[6] J-Crew's arguments are based on the legislative history for § 204 of the Clarification Act. Earlier in the report when discussing § 201 of the Clarification Act, the House Report expressly acknowledged that contracts have a role in the venue determination. *See* H.R. Rep. 112-10 at 17 (recognizing that venue may be waived "purposefully (by contract)").

whether venue is improper or wrong under other federal statutes and rules or the parties' agreement.

5. Congress Has Not Created Any Exception to the Venue Rules for Government Construction Contracts

Although Congress has the authority to establish specific venue rules for particular types of claims or contracts, Congress did not create an exception to the federal venue scheme for the construction industry. Contrary to ASA's suggestions, the Miller Act, 40 U.S.C. §§ 3131-3134, is not a generalized expression of congressional policy on venue for construction disputes. (*See* ASA Br. at 2, 30-32). The Miller Act has no application to this breach of contract case where no Miller Act claim is pending.

The Miller Act requires the contractor as principal to post a bond on many government projects. 40 U.S.C. § 3133. It authorizes a cause of action against the surety and principal in certain circumstances. 40 U.S.C. § 3133. Although the Miller Act specifies a venue for bond claims, *see* 40 U.S.C. § 3133(b)(3), it is not jurisdictional. *See e.g., F.D. Rich Co., Inc. v. U.S. ex rel. Indus. Lumber Co., Inc.*, 417 U.S. 116, 125-26 (1974). And the federal circuit courts hold that Miller Act venue is subject to a forum selection clause. *See, e.g., United States ex rel. Pittsburgh Tank & Tower, Inc. v. G & C Enterprises, Inc.*, 62 F.3d 35, 36 (1st Cir. 1995); *In re Fireman's Fund Insurance Companies*, 588 F.2d 93, 94 (5th Cir. 1979); *U.S. ex rel. B&D Mech. Contractors, Inc. v. St. Paul Mercury Ins. Co.*, 70 F.3d 1115, 1117 (10th Cir. 1995). ASA's arguments to the contrary are mistaken. (*See* ASA Br. at 31 (citing *United States ex rel. Vermont Marble Co. v. Roscoe-Ajax Constr. Co.*, 246 F. Supp. 439 (N.D. Cal. 1965))).

The 1965 decision ASA cites predates the more recent circuit court opinions.

B. Even Under § 1404(a), the Forum Selection Clause Is a Significant Factor that Is Central to the Analysis

The district court should not have reached the § 1404(a) balancing question because J-Crew did not file suit in the proper forum in Virginia. The district court compounded its error by applying the wrong legal standards in its analysis. The Fifth Circuit likewise erred when it treated the proper allocation of the burdens under § 1404(a) in cases involving forum selection clauses as a matter within the district court's discretion. (Pet. App. 9a-10a). The impact of a forum selection clause on the burden of proof under § 1404(a) is a pure question of law.

The party seeking to avoid its forum selection clause should bear the burden to overcome the clause, and should not be able to meet that burden based on evidence and arguments that were foreseeable at the time of contracting. (Pet. Br. at 24-27). If *Bremen* is "instructive" in the § 1404(a) analysis, *see Stewart*, 487 U.S. at 28, it teaches that a party seeking to overcome its contract bears a heavy burden, which cannot be met based on alleged inconveniences that were foreseeable at the time of contracting. *See Bremen*, 407 U.S. at 16-17. That holding follows from the well-recognized principle that, when parties reach an agreement on a matter, "[t]he agreement itself becomes the measure of the parties' equities." *See U.S. Airways v. McCutchen*, 133 S.Ct. 1537, 1548 (2013); *see also id.* at 1551 (Scalia, J., dissenting) ("equity cannot override the plain terms of the contract"). J-Crew offers no explanation why this rule should be different in a § 1404(a) analysis. The forum selection clause

should be recognized as the agreement among the parties on how to allocate any inconvenience among them, thereby resolving the § 1404(a) private interest factors in favor of the balance struck in the contract.

Throughout its brief, J-Crew repeats the key phrase from *Stewart* that a forum selection clause "is a significant factor that figures centrally in the district court's calculus." (Resp. Br. at 22, 25, 27 (citing *Stewart*, 487 U.S. at 29-31)). Merely citing the standard is no substitute for discussing what it means in the transfer analysis. Had J-Crew followed its contract and filed suit in Virginia, there would be no question that J-Crew would bear a heavy burden to avoid the clause and prove that transfer to Texas was appropriate under § 1404(a). J-Crew offers no explanation as to why it should be able to shift the burden to Atlantic Marine to justify a Virginia forum simply by breaching its contract. (*See* Pet. Br. at 26-27). The district court misallocated the burden.

J-Crew cannot avoid this conclusion by arguing that this is an "exceptional case" warranting departure from the forum selection clause.[7] This is a routine contract case under which the parties' forum selection clause should have been enforced. When the correct legal standard is applied to J-Crew's evidence, the Court should hold that most of J-Crew's evidence is not properly part of the § 1404(a) analysis because it

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[7] J-Crew's argument is based in part on a factual mischaracterization of the record. J-Crew argues that Atlantic Marine conceded its witnesses are located in Texas. (*See* Resp. Br. at 6, 24-25). The record is undisputed: "AMC's project management team, with the exception of those personnel required by contract to be onsite, who presided over and managed the subject project are located in Virginia." (JA 57 12).

focuses on alleged inconveniences that were foreseeable at the time of contracting. For example:

- J-Crew knew it was signing a contract to perform work in Texas (*see* JA 81-82);[8]
- J-Crew knew it would need to staff that project with its own employees, or with third-party subcontractors (*see* JA 81-82); and
- J-Crew hired subcontractors after already agreeing to the Virginia forum (*see* JA 82 915 ("J-Crew subsequently entered into several subcontracts...")).[9]

J-Crew knew or could reasonably have foreseen all of these points when it negotiated its contract. The Court should hold that, where parties have agreed to a forum, private interest concerns like these have no place in the §1404(a) analysis. *See Bremen*, 407 U.S. at 16-17.

Atlantic Marine recognizes that this Court's role is not to reweigh the evidence to determine whether transfer under § 1404(a) should have been granted. Instead, as in prior cases, the Court should announce

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[8] Although J-Crew claims this case will be governed by "substantive Texas contract law" (*see* Resp. Br. at 7), Ft. Hood is a federal enclave where state law does not control. *See Adams*, 396 S.W.2d at 949. Moreover, many issues in this case likely will be governed by the federal law of government contracts. (*See* JA 17 at ¶1). Finally, had J-Crew followed its contract and filed suit in Virginia, Virginia law would potentially control issues not governed by federal law. (*See* Pet. Br. at 20-22).

[9] J-Crew claims it will be unable to secure testimony from third-party witnesses in Texas. (Resp. Br. at 6). However, FED. R. CIV. P. 45 allows parties to serve subpoenas in Texas for deposition testimony and documents, even for use in cases pending in Virginia.

the proper legal analysis that applies, and then remand the case for consideration in light of the correct standards. *See, e.g., Van Dusen v. Barrack*, 376 U.S. 612, 646 (1964) (resolving legal questions and remanding for reconsideration of § 1404(a) analysis under correct rules).

CONCLUSION

There is nothing exceptional about this case that justifies a departure from the forum selection clause in the negotiated contract between Atlantic Marine and J-Crew. The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

IN RE: ATLANTIC MARINE CONSTRUCTION COMPANY, INC.

Petitioner,

v.

UNITED STATED DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN SUBCONTRACTORS ASSOCIATION IN SUPPORT OF RESPONDENT J-CREW MANAGEMENT, INC. SEEKING AFFIRMATION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

The Facts. J-Crew Management, Inc. ("J-Crew"), a Killeen, Texas company with approximately 5 employees, was hired by the Atlantic Marine Construction Company ("Petitioner"), a Virginia contractor doing business across the nation, to perform subcontract work building a child care facility at the Fort Hood military base near Killeen, Texas. The Project was within Texas borders and all Subcontract work was performed in Texas. When the Project ended, Petitioner withheld payment of the last $160,000 due to J-Crew. J-Crew sued in the U.S. district court in the Western District of Texas.

The Law. Forum selection clauses in construction contracts are unenforceable under the laws of *both* Texas and Virginia when the clause requires litigation to proceed in a forum outside the state where the project was located. Under 28 U.S.C. §1406, if venue is laid in the (presumptively) "wrong" court the district court must dismiss or transfer the case. But when venue is not wrong, 28 U.S.C. § 1404 requires the district court to resolve venue disputes by balancing the convenience of parties and witnesses in the interest of justice.

The Venue Dispute. Though Petitioner did not contest venue was otherwise proper under 28 U.S.C. § 1391, it moved to dismiss or transfer relying solely in that regard on the voidable (under Texas law) forum selection clause in its construction contract. Petitioner filed its motion under both 28 U.S.C. § 1406(a) and, alternatively, under 28 U.S. § 1404(a).

The District Court determined that 28 U.S.C. § 1404(a) applied instead of 28 U.S.C. § 1406. After considering the factors therein, and this Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), it declined to transfer the case, noting that if the forum selection clause was enforced J-Crew could not subpoena vital third-party witnesses for either testimony or documents. The 5th Circuit Court of Appeals affirmed, finding there was no clear error in the District Court decision.

Questions Presented. Where venue is otherwise proper under 28 USC § 1391: (1) can parties destroy venue by a private agreement that is void and unenforceable under state law? and (2) as part of the factors relevant to the litigation that district courts balance when resolving venue disputes under 28 U.S.C. § 1404(a), should federal courts consider state law and public policy as relevant to a party's request to enforce (or avoid) a forum selection clause?

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INTERESTS OF THE *AMICUS CURIAE*[1]

The American Subcontractor's Association ("ASA") is the nation's largest trade organization representing the interests of specialty trade contractors (construction subcontractors and material suppliers) in the construction industry. ASA represents approximately 5,000 direct member companies throughout the United States, and indirectly represents the interests of tens of thousands more commercial construction subcontractors, material suppliers, and service companies (collectively "subcontractors") of every size and from every region of the country. ASA members represent the combined interests of both union and non-union companies, and range from the smallest private firms to the nation's largest specialty contractors.

One of ASA's most important responsibilities is to represent the interests of its members in matters before the executive, legislative, and judicial branches of government at both the state and federal level. In the courts, ASA represents its members by submitting *amicus* briefs in state and federal courts on issues of vital concern to the nation's subcontracting community. **This is just such a case**.

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1. In accordance with Supreme Court Rule 37.6, ASA certifies that (a) no counsel for a party authored this brief in whole or in part, (b) no person other than ASA, its members and its counsel have made any monetary contributions intended to fund the preparation or submission of this brief; (c) that the parties have consented to the filing of this brief (blanket consents filed on May 16, 2013 from Petitioner, and May 21, 2013, from Respondent). As this case has been set for oral argument, the 10-day notice requirement of 37.2(a) does not apply.

ASA files this brief to give the Court the benefit of ASA's many years of practical experience and advocacy for just and fair treatment under the law. Affirming the decision below is crucial to furthering the plain language and purpose of 28 U.S.C. §1404(a) and will at the same time give due consideration to constitutional interests by recognizing the public policy of the federal and state governments that have determined that forum selection clauses in construction projects are unenforceable. This recognition is perhaps best reflected by: (a) the federal Miller Act, which requires that construction claims be brought in the state where the Project was located, and (b) the numerous states whose legislatures have determined it is **against the express public policy of the state** to force litigation of a construction dispute outside the state in which the construction project was located.

In contrast, reversing the well-reasoned opinion on appeal will unfairly and unreasonably tie the hands of federal judges from at least *considering* state law when faced with a venue challenge premised solely on a forum selection clause. Reversing the 5th Circuit would also embolden general contractors to **openly defy** the law of many states (and inferred federal policy in the Miller Act) by creating substantial barriers to a subcontractor's right to seek redress in a court near the Project site. Such a result would be detrimental to the legal system and at odds with principles of federalism and the express language of 28 U.S.C. §1404(a) giving federal judicial authority to balance the conveniences of the parties and witnesses, and the interests of justice when resolving venue challenges.

SUMMARY OF ARGUMENT

This amicus curiae brief seeks to inform the Court of the serious consequences of the improvident application of 28 U.S.C. §1406(a) to all contract disputes involving a forum selection clause. In its opinion, the U.S. Court of Appeals of the Fifth Circuit explained that "the core" of *Stewart Organization Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), "is the directive of Congress that allocation of matters among the federal district courts is not wholly controllable by private contract." *In re: Atlantic Marine Constr. Co., Inc.*, 701 F.3d 736, 743 (5th Cir. 2012).

This is true. Though Petitioner premises its requested relief on the presumption that venue is improper when a forum selection clause exists, 28 U.S.C. §1404(a) instead reflects Congress' intent that even when a forum selection clause exists federal judges must consider the "convenience of parties and witnesses, in the interests of justice" when deciding a request to transfer an action to another venue. See 28 U.S.C. § 1404(a).

The right of freedom of contract is not unlimited. It has long been the case that the four corners of a contract are subject to judicial review for conformance with applicable law and public policy. As this Court stated over a century ago:

> [T]he right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the State, enacted for the protection of the public health, safety or welfare, the same may

> be valid, notwithstanding they have the effect to curtail or limit the freedom of contract. **It would extend this opinion beyond reasonable limits to make reference to all the cases in this court in which qualifications of the right of freedom of contract have been applied and enforced.**

McLean v. Arkansas, 211 U.S. 539, 545-46 (1909)(emphasis added)

And not all contracts are created equal. Here, considering the factors set forth in 28 U.S.C. §1404(a) is important because enforcement of a forum selection clause in a ***construction contract*** implicates heightened public policy considerations and several layers of both state and federal law. These considerations include numerous state laws that void such clauses in construction contracts.

28 U.S.C. §1404(a) instructs federal judges to consider the "convenience of parties and witnesses, in the interests of justice" when deciding a request to transfer an action to another district or division where it might have been brought. Because private parties cannot contract 'around' the law, whether a contract clause is void or against the public policy of an interested state is, *at minimum*, something federal judges consider when applying the balancing of conveniences test under §1404. Courts have a fundamental duty to determine if a contract interpretation urged by a litigant raises any questions of public policy. If so, the question whether the agreement contravenes public policy "is ultimately one for resolution by the courts." See *W. R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 U.S. 757, 766 (1983)(internal

citations omitted)(noting that "[a]s **with any contract**, however, a court may not enforce a collective bargaining agreement that is contrary to public policy.... If the contract as interpreted by [the arbitrator] violates some explicit public policy, **we are obliged to refrain from enforcing it.**" (emphasis added)).

Petitioner's position that 28 U.S.C. §1406 should have applied to its request to transfer—with its presumption of improper venue based solely upon a forum selection clause— is misguided given that "issues of contract, including a contract's validity, are nearly always governed by state law." *Stewart*, 487 US 36 (Scalia, dissenting). In that regard approximately 40% of the states have expressly found that forum selection clauses in construction contracts are unenforceable if the project is located within the state and the clause requires litigation outside the state.

These state laws express the widespread and well-defined policy that forum selection clauses in construction contracts implicate greater legal, equitable, and policy concerns than such clauses in other commercial contracts. Petitioner's position, were it to prevail, would hamstring federal judges from considering those laws in the analysis required by 28 U.S.C. §1404(a), and instead wrongly require the federal judiciary to turn a blind eye to these concerns. This would be true even when, as was the case here, **the forum selection clause in question would be void in the state where the Project was performed.** This would unduly damage the efforts of this Court and Congress to minimize significant differences between state and federal courts in resolving disputes. *Cf. Southland Corp. v. Keating*, 465 U.S. 1, (1984) (interpreting Federal Arbitration Act to apply to claims brought in state

courts in order to discourage forum shopping). Such a result is wrong, contravenes state's rights, and is wholly unnecessary.

In contrast, affirming the reasoning of the District Court and the Fifth Circuit will preserve the right of federal judges to, when the original forum is jurisdictionally proper under 28 U.S.C. §1391, grant deference to state law and apply the standards set forth in 28 U.S.C. §1404(a). Where, as here, the state law or interests of justice militate against the enforcement of the clause, venue should not transfer. And, as this Court noted in *Stewart*, analysis under 28 U.S.C. §1404(a) still allows consideration of a forum selection clause as a "significant factor ... in the district court's calculus" when weighing the private and public interests in resolving venue challenges. *Stewart*, 487 U.S. at 29.

ARGUMENT

It is beyond dispute that parties cannot privately contract for something illegal or against public policy. See *McLean v. Arkansas*, 211 U.S. at 545-46 ("It would extend this opinion beyond reasonable limits to make reference to all the cases in this court in which qualifications of the right of freedom of contract have been applied and enforced.") Courts have not only the right, but a duty to refuse to enforce a contract clause that violates a strong public policy of the state in which they sit. See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)(holding that forum-selection clauses in admiralty contracts (which are governed by federal law) are generally enforceable but not if doing so "would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.").

In *Mayeux's A/C & Heating v Famous Constr. Corp.* No.97-0767, 1997 U.S. Dist. LEXIS 14047 (E.D. La. Sept. 10, 1997), the U.S. District Court refused to enforce a forum selection clause in a construction contract for a Project in Louisiana that required litigation in Texas. The Court noted that:

> One of the express exceptions to the enforcement of a contractual forum selection provision recognized by the Supreme Court in *Bremen* is if the clause "would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." 407 U.S. at 15, 92 S. Ct. at 1916. **Obviously, the clause contravenes a strong public policy of the forum state (and, perhaps, the forum court) in which suit was brought, as expressed in LSA-R.S. 9:2780. The statute nullifies and declares the instant [forum selection] provision void under Louisiana law.**
>
> A closer inspection also leads credence to the argument that the forum selection clause contravenes the policy of this federal forum, as expressed in the Miller Act.

Id. at *7 (emphasis added).

Federal courts clearly have a duty to enforce state public policy and have used that duty to void forum selection clauses substantively identical to the clause at issue in this dispute. If state law makes a certain forum selection clause void or voidable, this Court ought to clarify that federal judges should consider that fact in deciding whether to enforce a forum selection clause. As

the Fifth Circuit Court of Appeals correctly recognized, 28 U.S.C §1404(a) is the appropriate mechanism for federal district courts to balance public interests against private agreements.

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT 28 U.S.C. § 1404 APPLIED TO PETITIONER'S REQUEST TO TRANSFER VENUE.

Here, the District Court and Fifth Circuit Court of Appeals correctly held that 28 U.S.C. §1404 was the appropriate mechanism by which to weigh a forum selection clause in a private agreement.

In reaching its decision the District Court concluded that the convenience of the litigants and interests of justice militated against transfer to Virginia. While the Court did not focus on the state law public policy ramifications of request to transfer, ASA submits that even if this Court is not inclined to view state law as dispositive of the issue, 28 U.S.C. §1404 grants federal judges the discretion to consider such questions and state public policy as part of a *forum non conveniens* analysis that balances the conveniences to the parties and interests of justice when deciding a party's request that a federal court transfer the case to another venue.

Petitioner argues that 28 U.S.C. §1406(a) and Fed. R. Civ. P. 12(b)(3) controls the venue analysis here. Petitioner is wrong. Those statutes provide mechanisms which presume that a case has been filed in the wrong venue and provide no discretion to a district court judge to conduct a venue analysis.

> The district court of a district in which is filed a case laying venue in the **wrong** division or district ***shall*** dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. §1406(a) (emphasis added).

Here not even Petitioner argues that the forum selected by J-Crew was wrong under 28 U.S.C. §1391.[2] Instead, Petitioner and its *amici* misguidedly argue that District Courts should essentially turn a blind eye to anything but the language of the parties' contract to ensure "contractual certainty" and shield private agreements from the "unpredictable discretionary decision-making" of federal judges. See Chamber of Commerce, Amicus Brief, Pages 12-13.

But parties cannot privately agree to re-write federal statutes to make venue "wrong." Article III, Section I of the United States Constitution delegates to Congress the authority to promulgate statutes that control where venue lies in the District Courts. U.S. CONST., art. III, §1. Only the U.S. Congress can make "venue" in a federal forum inappropriate. A venue analysis must therefore start with determining whether venue was correct under 28 U.S.C. §1391 before deciding whether the private parties

---

2. Here, venue was correct (not "wrong") in the Western District of Texas under 28 U.S.C. § 1391 because the underlying contract was performed in Texas, the project site was in the Western District of Texas, and there was diversity jurisdiction. See *Cortex Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000)(venue is "clearly proper" in a District "within which [a] contract was performed" in its entirety).

had (or could) agree to anything different. If venue is jurisdictionally proper under federal law, then any request to change venue must be through 28 U.S.C. § 1404(a).

Under 28 U.S.C. § 1404, the District Court was **not** required to transfer the case to a venue chosen by private contract. The statute makes this clear:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court ***may*** transfer any civil action to any other district or division where it might have been brought ***or*** **to any district or division to which all parties have consented.**
>
> 28 U.S.C. § 1404(a)(emphasis added).

The last part of the above subsection – "or to any district or division to which all parties have consented" – was added effective January 6, 2012. It clarifies what this Court inferred in *Stewart:* that in the eyes of Congress, forum selection clauses do **not** control the initial venue determinations. They are, instead, a factor that Congress expressly left to federal judges to weigh given the interests of justice.[3]

Because the U.S. Code defines where federal venue is proper and where it is "wrong" and because the Texas court selected by J-Crew was proper under federal law, the Fifth Circuit rightly held there was no clear error in the District Court applying §1404 to the venue dispute.

---

3. Atlantic Marine does not claim that §1404 infringes any of its constitutional rights.

II. IT IS UNWISE, UNJUST, AND CONTRADICTS PRINCIPLES OF FEDERALISM TO PERMIT OR REQUIRE FEDERAL JUDGES TO DISREGARD THE LAW AND PUBLIC POLICY OF THE FORUM STATE.

Many states void or otherwise make unenforceable forum selection clauses in construction contracts. The Tenth Amendment affirms the Constitution's basic structure of defining the relationship between national and state governments. U.S. CONST. amend X. As James Madison wrote in *The Federalist* No. 45 "[t]he powers reserved to the several states will extend to all objects, which, in the ordinary course of affairs, concern the lives, liberty, and properties of the people, and the internal order, improvement, and prosperity of the state." THE FEDERALIST No. 45 (James Madison).

State and federal governments play an important role in America's unique system of dual sovereignty. As Justice Kennedy noted in *United States v. Lopez*, federalism was the Framer's "insight ... that *freedom was enhanced by the creation of two governments, not one.*" *United States v. Lopez*, 514 U.S. 549, 576 (1995). The right of the states to set their own public policy regarding what is (or is not) an enforceable contract clause is an example of how due consideration from the federal government to state governments can enhance justice.

Here, neither the Constitution nor any federal statute or Rule of Procedure addresses the validity of a forum selection clause. Texas law generally enforces such clauses but specifically addresses **and makes unenforceable** such clauses in a construction contract. See TEX. BUS. & COM.

CODE § 272.001. If state law prevents state court judges from enforcing a certain kind of contract clause that fact is, if it is not dispositive, *at minimum* an important consideration that federal judges should consider when resolving venue disputes, particularly where there is no conflicting and overriding federal policy or constitutional interests.[4]

To say otherwise would allow private parties to contract around the public policies of the states where they work. This would distort well-developed principles of federalism and impermissibly separate federal common law from the law of the state where the court is located. Such a result would be contrary to, and raise serious questions under, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Id.* at 78); See also, *Hanna v. Plumer*, 380 U.S. 460, 467-68 (1965)(*Erie* was "in part a reaction to the equal protection concerns raised by 'forum shopping'" and that any outcome determinative test "cannot be read without reference to the twin aims of the Erie rule: discouragement of forum-

4. In this way, the multitude of state statutes that invalidate forum selection clauses in construction contracts are very different from statutes like the one this Court addressed in *Preston v. Ferrer*, 552 U.S. 346 (2008), which was contrary to and thus preempted by the Federal Arbitration Act. State statutes voiding forum selection clauses do not prevent parties from litigating or arbitrating a dispute when it arises (as the *Preston* statute did, thus implicating the strong federal policy interests favoring arbitration) but merely require, as a matter of public policy, that any dispute resolution occur in the state where the project was located.

shopping and avoidance of inequitable administration of the laws.")

This is important here because many of this country's state legislatures (including those of both Texas and Virginia) have made unenforceable forum-selection clauses similar to the clause Petitioner seeks to enforce. Where 28 U.S.C. § 1406 bars any consideration of those state laws, § 1404 requires district court judges to consider state law (according at least passing deference to federalism interests) and weigh private contract against relevant public policy, when resolving venue disputes.

A. Numerous state legislatures have explicitly found that forum selection clauses in construction contracts are void, voidable, and/or against public policy.

Petitioner (and its *amici*) focus on commercial contracts and gloss over the fact this was a construction contract. That is a mistake. Enforceability of forum selection clauses in construction contracts implicates serious legal and policy concerns that separate construction contracts from other commercial contracts. These concerns can be addressed through the balancing of conveniences analysis under 28 U.S.C. § 1404(a), but would be at risk of being swallowed into the maw of 'other' commercial contracts under the standard Petitioner advances.

Legislatures and governors from across the country ("red" states and "blue") have explicitly recognized construction litigation is different in material respects from other commercial contracts. In those states the forum selection clause this Court is being asked to enforce

would either be: (a) **automatically** void; or (b) voidable and unenforceable. But the legislative branch can only write such laws into existence: it must rely on the courts to decline to enforce a void or illegal contract (or clause) when asked to enforce it. To preclude the federal judiciary from considering the interests of justice and state public policy would by judicial fiat declare irrelevant the sovereign policy determination of almost half of the nation's state legislatures.

This would conflict with established law that if the legislature has spoken on an issue of public policy, courts will give due consideration to the legislative action. As Justice Harlan noted in *Application of Gault*, 387 U.S. 1 (1967)(abrogated in part on other grounds, *Allen v. Illinois*, 478 U.S. 364 (1986)): "It is well settled that the Court must give the widest deference to legislative judgments that concern the character and urgency of the problems with which the State is confronted. Legislatures are, as this Court has often acknowledged, the 'main guardian' of the public interest, and, within their constitutional competence, their understanding of that interest must be accepted as 'well-nigh' conclusive." *Id.*, 387 U.S. at 70 (concurring in part, dissenting in part) (citing *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

The strong public policy against enforceability of forum selection clauses in construction contracts applies in all 50 states, but is most strongly evidenced by the sovereign judgment of the many state legislatures that have directly spoken on the issue. Eighteen states void forum-selection clauses that, like the provision at issue here, require construction disputes to be adjudicated outside of the state where the Project was located.

Another two states allow courts to disregard such clauses if enforcement would be unfair or unreasonable. And two other states make forum selection clauses in construction contracts voidable by the party against who the clause is sought to be enforced.

Texas belongs to this latter group. Like many states, Texas generally enforces forum selection clauses in commercial contracts and makes an exception to that general rule for construction contracts. Texas law provides that:

> If a [construction] contract contains a provision making the contract or any conflict arising under the contract subject to another state's law, litigation in the courts of another state, or arbitration in another state, **that provision is voidable by the party obligated by the contract to perform the construction or repair.**
>
> TEX. BUS. & COM. CODE §272.001 (2013) (emphasis added)

Were Texas law applied to the forum selection clause, as ASA believes it should have been, J-Crew's decision to void the clause would be indisputable. Similar results would occur in **all** of the following states, whose legislatures have unequivocally told the judiciary and persons doing business in the state that such clauses in construction contracts are **unenforceable** if the project was located in the state and the contract requires litigation outside the state.

States that void forum selection clauses in construction contracts that force construction participants to litigate in a state other than where the project is located.

State	Statute	Relevant Provision
1. Arizona	ARIZ. REV. STAT. ANN. § 32-1129.05 (West 2013).	Arizona makes "**void and unenforceable**" construction contract clauses that, when the project is in Arizona, requires litigation outside the state. Such clauses are "**against this state's public policy.**" (emphasis added)
2. California	CAL. CIV. PROC. CODE § 410.42 (West 2013)	California makes "**void and unenforceable**" provisions in a construction contract for work in the state if they require a California company to litigate outside the state. (emphasis added)
3. Connecticut	CONN. GEN. STAT. ANN. § 42-158m (West 2013).	Clauses in construction contract for work in the state are "**void and of no effect**" if they requires that disputes be resolved in a state other than Connecticut. (emphasis added)

4. Florida	FLA. STAT. § 47.25 (2012).	Florida makes "**void as a matter of public policy**" provisions in construction contracts for projects in Florida if the clause requires legal action involving a Florida company be brought outside the state. (emphasis added).
5. Illinois	815 ILL. COMP. STAT. 665/10 (2002).	Illinois makes "**void and unenforceable**" forum selection clauses in construction contracts if they requires litigation outside Illinois for in-state projects. Such clauses are "**against public policy.**" (emphasis added)
6. Louisiana	LA. REV. STAT. ANN. § 9:2779 (2012)	When the project is in Louisiana and one of the parties is domiciled in Louisiana, a construction contract clause that requires disputes be litigated outside the state is "**inequitable and against the public policy** of this state" and thus "**null and void and unenforceable.**" (emphasis added)

7. Minnesota	MINN. STAT. ANN. § 337.10 (West 2013)	Minnesota makes "**void and unenforceable**" provisions in a construction contract to be performed in Minnesota if they require litigation in another state. (emphasis added)
8. Montana	MONT. CODE ANN. § 28-2-2116 (2013).	Any provision relating to a construction contract for a project in Montana is "**against the public policy of this state and is void and unenforceable**" if it requires adjudication in another state. (emphasis added)
9. Nevada	NEV. REV. STAT. ANN. § 108.2453 (West)	Any provision in a construction contract for the improvement of property in Nevada is "**contrary to public policy and is void and unenforceable**" if it requires adjudication in another state. (emphasis added)

10. New York	N.Y. GEN. BUS. LAW § 757 (McKinney 2013).	New York makes "**void and unenforceable**" any provision in a construction contract (contracts with material suppliers excluded) that requires dispute resolution in another state. (emphasis added)
11. North Carolina	N.C. GEN. STAT. § 22B-2 (West 2012).	In North Carolina any provision in a contract for the improvement of real property in North Carolina is "**void and against public policy**" if it requires dispute resolution outside North Carolina. (emphasis added)
12. Ohio	OHIO REV. CODE ANN. § 4113.62 (West 2013).	Ohio makes "**void and unenforceable as against public policy**" any provision of a construction contract for an improvement to property in Ohio if it requires dispute resolution outside Ohio. (emphasis added).

13. Oregon	OR. REV. STAT. ANN. § 701.640 (West 2013)	Oregon makes "**void and unenforceable**" any provision in a construction contract if the project is in state and the provision requires dispute resolution outside Oregon. (emphasis added)
14. Pennsylvania	73 PA. STAT. ANN. § 514 (West 2013).	Forum selection clauses "**shall be unenforceable**" in a construction contract if the project is in Pennsylvania and the clause requires dispute resolution in another state. (emphasis added)
15. Tennessee	TENN. CODE ANN. § 66-11-208 (West 2013).	Any provision in a construction contract for the improvement of real property in Tennessee is "**void and unenforceable and against public policy**" if the project is entirely within Tennessee and the clause mandates dispute resolution in a different state. (emphasis added).

16. Utah	UTAH CODE ANN. § 13-8-3 (West 2012).	In Utah any forum selection provision in a construction contract performed in Utah is "**void and unenforceable as against the public policy**" if it requires disputes be resolved outside the state and one of the parties is domiciled in Utah. (emphasis added)
17. Virginia	VA. CODE ANN. § 8.01-262.1 (West 2012)	Any construction contract provision mandating that litigation be brought outside the Commonwealth "**shall be unenforceable**" if the project was in the Commonwealth and the clause requires legal action involving a Virginia company be brought outside the state. (emphasis added)
18. Wisconsin	WIS. STAT. ANN. § 779.135 (West 2013)	Forum selection clauses in construction contracts for the improvement of land in Wisconsin "**are void**" if they dispute resolution to occur in another state. (emphasis added)

Forum selection clauses that require litigation of construction disputes outside the state where the project was located offend the law not only in Texas (where J-Crew brought suit) but Virginia (Atlantic Marine's chosen 'forum'). Va. Code Ann. § 8.01-262.1(A)(West 2012) provides that:

> **§ 8.01-262.1. Place for bringing action under a contract related to construction.**
>
> A. Where a party whose principal place of business is in the Commonwealth enters into a contract ... for the construction [of an improvement] ... physically located in the Commonwealth, any .... provision in the contract mandating that [a cause of] action be brought in a location outside the Commonwealth **shall be unenforceable**.
>
> (emphasis added)

In addition to the states listed above, four other states make forum selection clauses unenforceable in certain instances. Those states are:

States that make unenforceable certain forum selection clauses.		
1. Nebraska	Neb. Rev. Stat. § 25-415 (2012).	Forum selection clauses may be disregarded for a number of reasons, including but not limited to whether enforcing the clause would "be unfair or unreasonable."

2. Rhode Island	R.I. GEN. LAWS ANN. § 6-34.1-1 (West 2012)	In Rhode Island construction contract provisions for improvements in the state are "**voidable by the party that is obligated by the contract to perform the construction or repair**" if the provision requires adjudication outside the state. (emphasis added).
3. South Carolina	S.C. CODE ANN. § 15-7-120 (2012).	Contract provisions requiring litigation outside the state do not preclude litigation in South Carolina with respect to a cause of action that is otherwise triable in the state. (emphasis added).
4. Texas	TEX. BUS. & COM. CODE ANN. § 272.001 (West 2013)	Construction contracts for improvements to real property located in Texas are "**voidable by the party obligated by the contract to perform the construction or repair**" if the contract requires litigation in another state. (emphasis added).

While the aforementioned states generally enforce forum selection clauses in commercial contracts, 90% of them have made an explicit determination that forum

selection provisions in construction contracts are unique and inequitable to the point of violating public policy.[5] Those determinations are of manifest importance and consideration for federal courts resolving venue challenges.

B. The use of forum selection clauses implicates important policy considerations unique to construction disputes and legitimate considerations under 28 U.S.C. § 1404(a).

When a state legislature has determined that a contract clause offends the policy of the state, it turns logic on its head to argue, as Petitioner does, that the clause is presumptively enforceable and the burden is on J-Crew to prove the clause is unreasonable. The legislature has *already made* the policy decision that the clause is void and it is not the burden of a party to prove this or anything further on a case-by-case basis.

It is no surprise that so many legislatures have invalidated forum selection clauses in construction contracts. Construction disputes in general are more complex and document intensive than typical contract or other litigation. It is not unusual for construction litigation to involve voluminous documents including but not limited to architectural plans, architectural and engineering specifications, shop drawings, warranties,

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5. It is revealing that not one **construction** industry trade group has weighed in on the side of Atlantic Marine in this dispute, despite there being no shortage of such groups aligned with the interests of general contractors and owners. This silence is deafening and perhaps indicates the widespread industry understanding of the prevalence of statutory exemptions that void forum selection clauses in construction contracts.

daily reports from numerous trades, meeting minutes, field reports, construction reports, weather records, bid documents, bids, employment records, payroll records, site photographs, Critical Path Method ("CPM) schedules, "bar chart" schedules, and schedule updates, not to mention emails and other correspondence. Construction projects also generally involve numerous third-parties who are key witnesses in any dispute—from architects, engineers, owner, construction managers, prime contractors, other trade subcontractors, lower tier "sub-subcontractors," suppliers, lower tier suppliers, laborers, schedulers, estimators, and layers of different independent experts including scheduling experts, claims consultants, designers, forensic accountants, and other construction trades.

Besides the long list of documents, witnesses and third-parties involved in any given construction dispute, in a contractor-subcontractor dispute, like the one here, there is a much greater concern about the potential disparity between financial capability, size, and sophistication of the parties. From the air-conditioned comfort of academe, it may be tempting to argue that forum selection clauses in all commercial contracts are arms-length transactions and negotiated agreements between sophisticated entities, no different than, say a contract between Halliburton and BP. But the real world of construction contracting is very different.

Subcontractors may be skilled in their specialty trades. But they are not typically "big players" and as a general rule lack the financial wherewithal of multimillion dollar general contractors. Subcontractors are typically locally owned family run businesses. Being incorporated

does not imbue one with the financial wherewithal or legal sophistication of a multi-million dollar general contractor with a national presence.

The construction sector also differs from most of the rest of the commercial economy in that when a subcontract is entered into there is only one buyer (the general contractor) for the Project and many sellers (subcontractors). This is because subcontractors typically bid a job before the prime contract is awarded but the prime contractor will not award (aka "negotiate") the subcontract until *after* it has been selected by the owner.

The general contractor thus enjoys a monopsony regarding the work. In economics, a monopsony exists where there is only one buyer and many sellers, and the buyer dictates the terms of the transaction.[6] As the only buyer of the subcontract services for the Project, the general contractor has the power to dictate subcontract terms, including terms that may be inefficient, legally unenforceable (as Petitioner did here in including a forum selection clause that that was unenforceable under Texas law) or against public policy.

Census Data confirms ASA's experience about the massive disparity in size and power of the national

---

6. In contrast, in a monopoly there is only one seller so the seller dictates the terms of sale. For a general discussion of monopsonies in different markets, see e.g., Alan Manning, Monopsony in Motion: Imperfect Competition in Labour Markets, Princeton Univ. Press; S.E. Atkinson and Joe Kerkvliet, *Dual Measures of Monopoly and Monopsony Power: An Application to Regulated Electric Utilities*, 71 The Review of Economics and Statistics, no. 2, 1989, 250–257.

contractors and small local subcontractors and specialty trades. The last available Census Data information (from 2007) reveals that for every construction company that made more than $10 Million annually there were 14.3 construction companies making less than $500,000 in gross revenue. See U.S. Census Bureau, at "*Selected Statistics for Establishments by Value of Business Done Size Class: 2007.*"[7] And though only 3.8% of the contractors in the business made over $10 Million annually, they dominate the market, holding originated contracts for over 60% of the nation's construction work compared to the 4.7% held by the smaller companies. Id.

These larger construction companies (those making over $10 Million annually) subcontracted out a whopping 76.5% of the total construction work to others. In contrast, the smaller companies subcontracted out only 1.27% of their work. *Id.* The plain conclusion is what happened here is not unusual: the largest general contractors bid projects across the country, winning ("originating") contracts nationally and then subcontracting much of the actual work to subcontractors, who are generally located near the project.

Given the realities of the market, the financial and economic leverage of general contractors to dictate inequitable contract terms is a much larger public policy concern than is present in other economic transactions. The typical practice is that general contractors, using their leverage as the party with a monopsony over the

---

7. http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_23SG03&prodType=table

Project, dictate the subcontract form that subcontractors must use. Thus, if the subcontract has a forum selection clause, the "selected" forum will inevitably be the "home court" for the general contractor.

It is also far more prevalent in the industry that the general contractor will travel into foreign states to perform its work (and will, once there, subcontract with local subcontractors). Since general contractors typically "hold" for some period of time the money paid by owners for subcontract work, it is subcontractors who typically must pay their own bills (payroll, home office rental, field rental, equipment rental, etc.) and 'finance' the project, only to later "chase" the general contractor to recover monies they have already advanced. Many owners hold retainage of 5-10%, further decreasing necessary cash flow to subcontractors.

When the reality of the slanted terms of a proprietary subcontract form are added to the financial strains and demands of complex construction litigation, the costs to litigate construction disputes can be prohibitively expensive to smaller family-owned companies. If a forum selection clause is added to the mix—with the venue changed to one where witnesses and documents are unavailable—the impact will again disproportionately fall on the party with the least bargaining power (typically the subcontractor).

In this way, forum selection clauses in construction contracts can inequitably chill a litigant's ability to pursue or obtain justice. If Petitioner succeeds in this appeal, the facts presented to this Court represent a dilemma that would not be unusual. Petitioner is a general contractor with revenues well in excess of $10 Million annually.

(See http://www.manta.com/c/mmdrljs/atlantic-marine-construction-company-inc showing $40 Million in gross sales, attached hereto as Appendix 1.) It proclaims on its own website that it routinely travels throughout the United States to perform work. See generally *www.amccinc.com*. Here, it went to Texas to bid a multi-million dollar job. It won the job, then subcontracted (using its form subcontract) most of the work to small local companies, including J-Crew (5 employees). Petitioner withheld a significant final payment to J-Crew and when it was sued for that payment it asked the federal court to enforce a forum selection clause ***that was unenforceable*** in the state where the Project was located.

Thus, the same contractor who had no problem traveling across state borders for a multimillion dollar payday, then claimed (while it was *still* in Texas wrapping up the work) that the District Court should enforce a voidable clause in the Subcontract because it would be too burdensome for it to *stay* in the state to litigate! If its request was granted, the case would have been subsequently transferred to a court that lacked subpoena power over witnesses and documents vital to the subcontractor's case.

A multitude of state legislatures have expressly determined that this type of hardship—the creation of barriers to litigation that fall heaviest on those least able to financially sustain it—would be so common in construction dispute as to make forum selection clauses in construction contracts unenforceable and even against public policy. This is correct: the additional burdens can often be *prohibitive* and effectively deprive a subcontractor of its day in court and/or leverage it to heavily discount, if not abandon, even the most worthy of claims.

If this Court grants Petitioner's request it will effectively write 28 U.S.C. § 1404(a) out of the U.S. Code if a dispute involves a forum selection clause. This would unduly tie the hands of the courts to consider the law and public policy of the state where the work was performed. That would be wrong and unnecessary because state law ought to apply to the venue dispute here and even if it was not dispositive, the plain language of 28 U.S.C. § 1404(a) authorizes federal judges to consider, but *not* blindly enforce, forum selection clauses when resolving venue disputes.

C. The Federal Miller Act evidences the U.S. Congress' decision that resolution of construction disputes should occur in the state where the Project was located.

Though no federal statute or Rule of Procedure addresses the validity (or invalidity) of forum selection clauses, Congress has expressed its preference that litigation of construction disputes occur in the state where the project was located. 40 U.S.C. §§ 3131-3134 (2013)[8] (the "Miller Act") requires general contractors to provide payment bonds on federal construction contracts exceeding $150,000. Because mechanic's lien laws do not apply to federal property, payment bonds serve as a lien substitute and payment security to subcontractors. Under the Miller Act:

---

8. Formerly codified at 40 U.S.C. §270(a)—270(d).

> (3) Venue.— A civil action brought under this subsection **must** be brought—
>
> **(A)** in the name of the United States for the use of the person bringing the action; and
>
> **(B)** in the United States District Court for any district **in which the contract was to be performed and executed,** regardless of the amount in controversy.
>
> 40 U.S.C. § 3133(b)(3)(emphasis added)

The Miller Act thus requires claimants to sue in a district court where the construction was performed and executed without regard for what its contract might say or the amount in controversy. In *United States for the use and benefit of Vermont Marble Co. v Roscoe-Ajax Constr. Co.* 246 F Supp. 439 (N.D. Cal. 1965), the U.S. District Court for the Northern District of California (Southern Division) addressed a dispute arising under the former version of the Miller Act. It noted that the "[j] urisdictional provision of Miller Act ... requiring every suit to be brought in United States District Court for any district in which the contract was to be performed and executed, 'and not elsewhere,' ***prohibited change of venue to another district contractually agreed upon by parties.***" *Id.* (emphasis added).

Though the "and not elsewhere" language in the Miller Act has since been changed, leaving open the possibility that forum selection clauses may be enforceable in Miller Act claims, the Congressional mandate that venue for such

suits lie in the place where the project was performed remains. Courts have recognized that the venue provisions of the Miller Act "facilitate[] subpoenaing of essential witnesses who participated in work at contract site." See e.g., *United States for use and benefit of Essex Machine Works, Inc. v Rondout Marine, Inc.*, 312 F Supp. 846 (SD NY 1970). Federal law embodied within the Miller Act thus reflects the same public policy concerns that underlie the state statutes that invalidate forum selection clauses in construction contracts.

D. Other *Amici* ignore the distinctions between types of commercial contracts and relevant state law that recognizes those distinctions.

It is not uncommon for large national contractors to bid on projects far away from their home offices. It is a reality of modern construction that national contractors rarely rely on their own labor force to do the vast majority of the work. Instead, they commonly "contract out" much (if not all) of the work to specialty trade contractors who typically are local and employ skilled workers near the project site.

Large projects can easily involve dozens of businesses and hundreds of different people brought together in a specific location. "Contracting-out" work to subcontractors saves general contractors the need to specialize in a narrow trade that they could not perform as competently or cost-efficiently as the subcontractor. The owner obtains both higher quality *and* lower cost from an arrangement where the subcontractors are performing the actual work. At the same time the general contractor is able to focus its construction expertise by coordinating the work performed by subcontractors.

Even if a general contractor could perform the work itself, the significant expense and hassle of shipping to a far away project the equipment, materials, and, most importantly, labor makes it more prudent to 'subcontract' the work to local companies. Large contractors thus benefit tremendously in hiring subcontractors to perform the actual construction. And subcontractors benefit from working with general contractors who not only have the management skills to run and coordinate large complex projects and the many people and trades involved in them, but who have the financial means and bonding capacity (to post the Miller Act performance and payment bonds necessary for the project) to contract for large-scale projects that the subcontractor otherwise could not compete for.

But most subcontractors and general contractors do not enjoy equal footing in negotiating contracts. Far from an ideal free-market, subcontractors are commonly presented with "take-it-or-leave-it" contracts prepared by the general contractor's lawyers. In the real world, subcontractors have little practical opportunity to negotiate contractual provisions, and really only directly control the price at which they bid the work. Forum-selection clauses in construction subcontracts are not typically the product of "negotiated" agreement—if that term has any meaning at all. Rather, subcontractors are often left with the choice of accepting boilerplate terms in a subcontract form provided by the general contractor or losing the subcontract to a local competitor. In the best of times this is little of a choice. And in difficult economic times, there is really no choice at all for a company needing work to stay alive.

The fact that forum selection clauses are "widely used in contracts of all types, by businesses large and small," *Chamber of Commerce, Amicus Brief,* Page 10, illustrates the extent to which forum selection clauses have become part of the extensive boilerplate in commercial agreements. But the idea that such clauses are "a vital part of the agreement," can "figure prominently" in contract negotiation (as the Chamber argues), and support a presumption that each party "has been compensated by the bargain for any inconvenience it might suffer by resort to [the selected] forum," (Pet. App. 23a-24a) may be appealing in a vacuum but is misplaced when raised in a construction dispute.

For the reasons discussed above, subcontractors typically have little leverage to negotiate the boilerplate terms of such contracts, particularly those that do not have a direct impact on the work. Like many subcontractors J-Crew is best described as a "mom-and-pop" company, with only 5 employees. In contrast, Petitioner is a $40 Million Company with approximately 40 employees. See attached Appendix 1.

The legal experience, sophistication, and resources of Petitioner as compared to J-Crew belies the suggestion that such parties can as a matter of course be presumed to "negotiate" on an even playing field. All negotiations are colored by the realities of the economic situation. By necessity subcontractors looking for work from a general contractor must confine their focus to ensuring the subcontract scope of work reflects what they bid as they vie for the limited jobs available at any given time in their geographical area. In contrast, national contractors exercise absolute discretion in where they bid and work.

If a state is too remote or too inconvenient to travel to the general contractor simply will not bid the project.

Petitioner's choice to bid on a project in Texas, and to travel into that state to work was much more of a free "choice" than J-Crew's acceptance of Petitioner's boilerplate subcontract terms. Petitioner was not too inconvenienced by the distance to go into the heart of Texas to work. In that light, requiring it to adjudicate in Texas is not unduly "prejudicial." Petitioner's complaints about the burdens of traveling to Texas to litigate are specious given that it boasts on its website that it has "completed successful projects from . . . Virginia to California for various branches of the Armed Services," and "conduct[s] business throughout a broad geographical area," *See* Petitioner's website, "Who We Are" tab, http://amccinc.com/WhoWeAre.aspx (last visited August, 8, 2013), attached hereto as Appendix 2.

Atlantic Marine is rightfully proud of its financial strength and its successful completion of work across the entire country. But in that respect, it is very different from the local subcontractors it employed on the Project. It is also no different than most national general contractors who, like Petitioner did here, work across the country, routinely disregarding the law and public policy of many states where they work by inserting void or voidable boilerplate forum selection clauses in their subcontracts, and who rely on local subcontractors to perform the bulk of their work. It is disingenuous to suggest it would be an undue hardship for Petitioner (or any similarly situated general contractor) to litigate in a state it freely traveled into to work.

The only real injustice that could arise would be if the Fifth Circuit was reversed. The reversal Petitioner seeks would compel federal courts to disregard: (1) the law of the state where the Project was located, and (2) the legitimate policy concerns those laws were designed to address. Reversal would also mean that a small Texas-based subcontractor (and many other similarly situated subcontractors ensnared by such a decision) would be forced to travel across the country to litigate claims for payment in states where they never worked, and before courts lacking subpoena power over important witnesses and documents. In such a fashion, the reversal Petitioner seeks would create an injustice that the doctrine of *forum non conveniens*, codified by Congress in 28 U.S.C. § 1404, was created to avoid.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Fifth Circuit was correct. It should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A — ATLANTIC MARINE CONSTRUCTION COMPANY INC., COMPANY PROFILE PAGE

U.S. Virginia Beach, VA – Building & Construction Heavy Construction, NEC Virginia Beach Marine Contractors - Atlantic Marine Construction Company Inc.

Company Profile Page

Atlantic Marine Construction Company Inc.

Amc
3465 Chandler Creek Road
Virginia Beach, VA 23453-2885 map

Ads

Company Information Complete data available on 85M companies. Learn More.

www.hoovers.com/business_info

About Atlantic Marine Construction Company Inc.
Phone: (757) 362-0023
Website: www.amccinc.com

Top 5 Marine Contractors near Virginia Beach, Virginia

1. Waterfront Marine Construction
2. Lynnhaven Dock Corp.
3. Early Marine Inc.

4. Lynnhaven Salvage Inc.
5. Flint Construction CO
See All Marine Contractors

More Details for Atlantic Marine Construction Company Inc.

Atlantic Marine Construction Company Inc. in Virginia Beach, VA is a private company categorized under Marine Contractors. Our records show it was established in 1993 and incorporated in Virginia. Current estimates show this company has an annual revenue of $40,000,000 and employs a staff of approximately 40.

Company Contacts

Bruce Exum, Jr.

Business Categories

Marine Contractors in Virginia Beach, VA
Heavy Construction
Other Heavy and Civil Engineering Construction

Atlantic Marine Construction Company Inc. Business Information

Atlantic Marine Construction Company Inc. also does business as Amc.

Appendix A

Business Information

Location Type	Single Location
State of Incorporation	Virginia
Annual Revenue Estimate	$40,000,000
8IC Code	1629, Heavy Construction, NEC
Employees	40 40 * *
NAICB Code	237990, Other Heavy and Civil Engineering Construction
Years in Business	20

Explore companies like – *Atlantic Marine Construction Inc.*

APPENDIX B — AMC COMPANIES, MISSION STATEMENT

AMC Companies
Atlantic Marine Construction Company, Inc.

Who We Are

Mission Statement • Our People

Atlantic Marine Construction Company, Inc. (AMC) is a multi-state licensed, Class A, General Contractor. We are a certified SBA 8(a) contractor, as recognized by the SBA, and a registered Woman Owned Business (WBE).

The company was founded in 1985, and incorporated as Atlantic Marine Construction in 1992. As a family owned and operated business we constantly strive to provide quality services with a tireless commitment to our customers. The founding family members are the active managers of the corporation's day to day operations.

We have completed successful projects from the Virginia to California for various branches of the Armed Services. Current and recent customers include the U.S. Department of Defense, the U.S. Department of Veterans Affairs, the U.S. Navy, the U.S. Army, the U.S. Air Force, and the U.S. Marine Corps.

We have continually exceeded our customer's expectations. Our professional staff has extensive experience in all aspects of construction. Our staff is as committed to our customer's needs and requirements as are the company's

owners. It is this type of commitment that has allowed this company to grow successfully and achieve goals beyond expectations.

"Outstanding in every respect ..."

"...particularly impressed with their promptness and attention to detail."

... these are but a few of the many very affirmative comments addressed to us concerning our performance and workmanship.

To consistently obtain "exceeding expectations" results we work diligently to provide our customers with the strongest team possible to accomplish all that is requested of us. To that end, we seek principled, professional people who personally exercise honesty and integrity, and integrate them our team as employees, contractors and partners. The effect of this philosophy has been strong relationships with our customers and overwhelming growth and success for our company.

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Site by Marathon Consulting

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUN 24 2013
OFFICE OF THE CLERK

No. 12-929

IN THE

Supreme Court of the United States

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

J-CREW MANAGEMENT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing more than 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Among its members are companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of concern to the nation's business community. It filed an *amicus* brief in this case at the petition stage urging the Court to grant review. See Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Petitioner, No. 12-929 (Feb. 25, 2013).

Many of the Chamber's members and affiliates include forum selection clauses in their business contracts. As a result, the questions presented in this case concerning the enforcement of such clauses significantly affect the interests of the Chamber and its members. By declining to enforce a forum selection clause in an agreement that was negotiated in an arms-length transaction between experienced business entities, the decision below frustrates the legitimate contractual expectations of thousands of

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3, *amicus curiae* states that petitioner and respondent have filed letters with the Clerk of the Court granting blanket consent to the filing of *amicus* briefs.

businesses with similar contract provisions. If permitted to stand, it will undermine the ability of parties to structure their business contracts so that they can select in advance and limit the fora in which disputes will be litigated. It also will likely discourage businesses from expanding the geographic reach of their operations, for fear of being unable to control and limit their litigation costs. In addition, the decision below invites uncabined forum-shopping.

For all of these reasons, and for the reasons set forth in petitioner's brief, the Chamber respectfully submits that the decision of the Fifth Circuit should be reversed.

SUMMARY OF ARGUMENT

The court of appeals' decision not to enforce the parties' negotiated forum selection clause, and its rationale for doing so, undermine contractual certainty. Forum selection clauses are widely used and serve important purposes in many business contracts. They enable parties to eliminate uncertainty as to where litigation will take place and to reduce their potential litigation costs by limiting the fora in which they can be sued. They also allow parties (and courts) to avoid costly and time-consuming pretrial motion practice on venue issues. For these reasons, forum selection clauses are often an essential part of the parties' bargain.

The decision below fosters commercial uncertainty because it creates an unreliable regime for the enforcement of forum selection clauses. By leaving enforcement of forum selection clauses to the discretion of district court judges, under a standard where the clauses are merely one factor that the judges consider as part of a multi-factor balancing test, parties cannot predict with any confidence

whether their forum selection clause will be enforced. This approach has several detrimental consequences for businesses. It frustrates the legitimate contractual expectations of the thousands of businesses that have such clauses in their contracts and prevents them and their customers from realizing the substantial efficiencies that can be achieved from limiting litigation costs. More importantly, it discourages certain transactions and forms of business activity altogether – particularly for small businesses – such as geographic expansion.

The decision below also promotes harmful forum-shopping because courts often decline to enforce forum selection clauses under the discretionary approach, which rewards plaintiffs who breach forum selection clauses by filing suit in a non-contractual forum. Even if such plaintiffs are ultimately unsuccessful in controlling the forum, the court of appeals' approach further promotes forum-shopping because it gives them the opportunity to control the choice of law rules that govern the dispute.

Enforcement of forum selection clauses is fully consistent with the venue statutes. The court of appeals' approach is premised in part on its view that allowing private parties to determine venue through contractual agreements somehow undermines Congress' purpose in enacting the venue statutes and intrudes on courts' authority to address venue issues. The court of appeals' concerns about private agreements that "transcend" federal venue statutes are wholly misplaced in this case, where the parties' contractually specified venue is permissible under the applicable venue statute.

More broadly, enforcement of forum selection clauses is in harmony with the venue statutes and the authority that Congress has given to courts.

Forum selection clauses promote the core purposes of the venue statutes – to ensure that cases are litigated in locations that are convenient to both parties – and their enforcement therefore furthers, rather than encroaches on, Congress' objectives in enacting those statutes. In addition, the venue statutes provide considerable leeway for private venue choices to operate, most notably because the rights conferred by those statutes are waivable. Recent amendments to the venue statutes further confirm that Congress favors the enforcement of venue choices that are the product of consensual agreements. Assertions that forum selection clauses intrude on courts' authority to address venue issues are similarly misplaced.

ARGUMENT

In *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15 (1972), this Court held that forum selection clauses "are prima facie valid" and should be enforced "unless [the party seeking nonenforcement] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." See also *id.* at 15 ("the forum clause should control absent a strong showing that it should be set aside"). While *Bremen* involved a forum selection clause that was the product of "an arm's-length negotiation by experienced and sophisticated businessmen," *id.* at 12, the Court subsequently relied on its reasoning in *Bremen* to enforce a "nonnegotiated forum-selection clause" in a "form contract" (a cruise ship ticket). *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 593 (1991).

Contrary to these seemingly well-settled principles, the court of appeals declined to enforce a negotiated forum selection clause between experienced business entities providing that all disputes would be litigated

in Virginia. The court first held that petitioner's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(3)[2] and 28 U.S.C. § 1406[3] was not an appropriate procedural mechanism for challenging venue because, in its view, venue was not improper in the chosen forum – even though respondent's suit was filed in clear breach of the parties' forum selection agreement. It held instead that the appropriate mechanism was 28 U.S.C. § 1404,[4] which relegates venue transfer decisions to the discretion of district court judges, based upon their balancing of a variety of practical and equitable factors in addition to the existence of the forum selection clause. The court of appeals then affirmed the district court's determination under Section 1404's balancing test that petitioner had not satisfied its burden of showing that a transfer was warranted under the totality of the circumstances of this case.

The Chamber agrees with petitioner's analysis demonstrating that the use of Section 1404 to resolve challenges to lawsuits filed in violation of forum selection clauses that contemplate a federal forum, rather than Section 1406 and the standards that this Court announced in *Bremen*, is fundamentally flawed

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[2] Rule 12(b)(3) provides for a motion to dismiss for improper venue.

[3] Section 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

[4] Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

as a matter of statutory construction and eviscerates this Court's precedents holding that reasonable forum selection clauses are valid and should be enforced. The Chamber will not echo petitioner's analysis of those issues, but instead will amplify additional reasons why the decision below should be reversed. *First*, the court of appeals' use of Section 1404 to address enforcement of forum selection clauses severely undermines contractual certainty with respect to such clauses – a result that will discourage many forms of legitimate and beneficial business activity. *Second*, the decision below is wrong that allowing private parties to determine venue through contractual agreements interferes with Congress' prerogatives in enacting the venue statutes and with the courts' authority to address venue issues.

I. THE COURT OF APPEALS' DECISION UNDERMINES CONTRACTUAL CERTAINTY AND ENCOURAGES FORUM-SHOPPING.

The decision below frustrates the legitimate contractual expectations of parties who enter into forum selection clauses by failing to enforce them as written, and instead treating them as mere factors that are weighed as part of a free-wheeling and inherently unpredictable balancing test. That approach is simply irreconcilable with this Court's holding in *Bremen* that forum selection clauses are "prima facie valid" and should "control" absent a "strong showing" of fraud or unreasonableness. *Bremen*, 407 U.S. at 10, 15.

A. Forum Selection Clauses Serve Important Purposes In Business Contracts.

As this Court has recognized, forum selection clauses serve important functions in many business contracts. These clauses allow the parties to a contract to "eliminat[e] . . . uncertainties" concerning the possible fora of a contract dispute, and thereby eliminate the risk of a highly inconvenient forum, "by agreeing in advance on a forum acceptable to both parties." *Bremen*, 407 U.S. at 13; *Carnival*, 499 U.S. at 593-94 ("a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended"); *Pelleport Investors, Inc.* v. *Budco Quality Theatres, Inc.*, 741 F.2d 273, 280 (9th Cir. 1984) ("[E]nforcement of a freely negotiated forum selection clause comports with long-established notions of freedom of contract and allows parties in routine commercial transactions to eliminate the uncertainties of where litigation will take place.").

In addition, by specifying a forum, these clauses allow the parties (and courts) to avoid "cost[ly]" and "time-consuming pretrial motions" on the question of where a dispute should be resolved. *Stewart Org., Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring); *Carnival*, 499 U.S. at 594 (forum selection clauses "spar[e] litigants the time and expense of pretrial motions to determine the correct forum and conserv[e] judicial resources that otherwise would be devoted to deciding these motions"); cf. *Bowen* v. *Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting) ("Nothing is more wasteful than litigation about where to litigate . . . .").

Forum selection clauses also allow parties to limit the fora in which they can be sued, which this Court

has recognized can reduce their potential litigation costs. *Carnival*, 499 U.S. at 593-94 (finding that cruise line had an interest in "limiting the fora in which it potentially could be subject to suit" and that the cost "savings that the cruise line enjoys by limiting the fora in which it may be sued" can be passed on to passengers); *Bremen*, 407 U.S. at 12-13 (finding that parties to an international ship towing contract had "compelling reasons" to negotiate a forum selection clause in order to avoid the potential for litigation "in any jurisdiction in which an accident might occur" along the towing route).

Because forum selection clauses serve these important purposes, they are often – as this Court has recognized – "a vital part of the agreement" as a whole and can "figur[e] prominently" in the negotiation of "monetary terms." *Id.* at 14. Indeed, as the concurring judge below properly recognized, "the negotiation of a forum-selection clause involves various economic decisions and often requires a party to make concessions in exchange for the assurance that potential litigation will occur in a predetermined forum." Pet. App. 23a-24a; see also *Gen. Eng'g Corp.* v. *Martin Marietta Alumina, Inc.*, 783 F.2d 352, 360 (3d Cir. 1986) (courts assume that business entities "will calculate the risk of bringing suit (or being sued) in another jurisdiction and include this risk in the price of their services"); *TUC Elecs., Inc.* v. *Eagle Telephonics, Inc.*, 698 F. Supp. 35, 39 (D. Conn. 1988) ("[W]here parties have freely agreed upon a particular forum for their disputes, it is presumed that each party has been compensated by the bargain for any inconvenience it might suffer by resort to that forum."). This is why this Court views forum selection clauses as presumptively enforceable.

The foregoing benefits of forum selection clauses are particularly important to small businesses. Small businesses have a vital interest in "keep[ing] the cost of potential disputes at a minimum," including by limiting the fora in which they litigate disputes and by "bring[ing] a lawsuit or defend[ing themselves] as close to home as possible." Trippe S. Fried, *Maintaining the Home Court Advantage: Forum Shopping and the Small Business Client*, 6 Transactions: Tenn. J. Bus. L. 419, 419 (2005). Forum selection clauses are therefore an essential tool for small businesses to control and limit their litigation costs. *Id.* at 434 (encouraging small businesses to use "written agreements with vendors and customers" that include forum selection clauses); see also Stephen R. Buckingham, Comment, Stewart Organization v. Ricoh Corp.: *Judicial Discretion in Forum Selection*, 41 Rutgers L. Rev. 1379, 1382 n.13 (1989) (discussing the advantages of forum selection clauses as "a cost control measure"). These clauses are especially critical when small businesses attempt to grow and diversify by expanding the geographical scope of their operations. Without the ability to control their litigation costs by limiting the fora in which litigation can take place, small businesses might be reluctant to undertake such expansion.

Petitioner Atlantic Marine is a prime example of a company that "conduct[s] business throughout a broad geographical area" and, therefore, "rel[ies] on forum-selection clauses to ensure that [it] can anticipate business costs and avoid litigation in a plethora of possible venues." Pet. App. 24a (Haynes, J., specially concurring). Atlantic Marine is "a family owned and operated" general contractor. See Atl. Marine Constr. Co., *Who We Are*, http://amccinc.com/WhoWeAre.aspx (last visited June 18, 2013).

Although it is headquartered in Virginia Beach, Virginia, it has "completed successful projects from . . . Virginia to California for various branches of the Armed Services." *Id.* As in the instant subcontract, Atlantic Marine negotiates and relies upon forum selection clauses in its agreements. It is thus the prototypical entity that requires a predictable rule of enforcement of forum selection clauses to allow it to operate interstate.

Because of their benefits to parties, forum selection clauses are widely used in contracts of all types, by businesses large and small. See *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) ("particularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction"); 14D Charles Alan Wright, *Federal Practice and Procedure: Jurisdiction* § 3803.1, at 50 (3d ed. 2007) (forum selection clauses "appear in contracts of every description" and "are being used with greater frequency"); Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 Vand. L. Rev. 1975, 1978 (2006) ("companies frequently agree to choice of law and choice of forum provisions when they enter into contracts," including contracts that "cover a wide range of corporate activities, such as employment and severance agreements, dispute settlement, mergers and asset purchases, financing agreements, and securities transactions"); Maral Kilejian & Christianne Edlund, *Enforceability of Choice of Forum and Choice of Law Provisions*, 32 Franchise L.J. 81, 81 (2012) ("Most franchise agreements contain both choice of forum and choice of law clauses, which usually have a connection with the

franchisor's home state"); Scott J. Burnham, *Contractual Relations In Small Business: Do The Benefits Of A Custom-Made Contract Outweigh The Costs?*, 7 J. Small & Emerging Bus. L. 425, 429 (2003) (choice of forum clauses "[i]ncreasingly" are included in small business contracts).

Like any provision that businesses agree to and choose to put in their contracts, businesses want and expect forum selection clauses to be enforced. Such clauses are included in contracts to create certainty about the venue of potential litigation, and such certainty is often a prerequisite to the transaction or relationship going forward. Cf. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) (addressing international arbitration clause and holding that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."). As a result, commercial certainty is destabilized when judicial enforcement is lacking or unreliable, such that parties have no way of knowing whether their forum agreement will have binding effect. See *Norfolk & W. Ry.* v. *Am. Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991) ("A contract has no legal force apart from the law that acknowledges its binding character."). Without predictable and enforceable contract rights, business activity cannot flourish.

B. Section 1404 Is Not An Effective Means Of Enforcing Forum Selection Clauses.

The decision below fosters commercial uncertainty because it creates an unreliable regime for the enforcement of forum selection clauses. Unlike the Circuits that address challenges to lawsuits filed in

violation of forum selection clauses under Section 1406, and that presumptively enforce those clauses pursuant to the *Bremen* standards, the Fifth Circuit held that such challenges can only be brought under Section 1404. Section 1404, however, is not a suitable or effective means of enforcing forum selection clauses because it is merely a transfer mechanism subject to unpredictable discretionary decision-making, as occurred in this case. The statute permits, but does not require, district courts to order venue transfers in certain circumstances. See 28 U.S.C. § 1404(a) ("a district court *may* transfer") (emphasis added). Because Section 1404 leaves enforcement of forum selection clauses in individual cases to the option of district court judges, it cannot provide the certainty that contracting parties require to enter into business transactions. See *Stewart*, 487 U.S. at 29 ("Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'") (quoting *Van Dusen* v. *Barrack*, 376 U.S. 612, 622 (1964)). A discretionary approach, by its nature, undermines rather than promotes contractual certainty.

In addition, Section 1404 neither expressly addresses forum selection clauses nor requires that they be presumptively enforced. Instead, it directs district courts to consider "the convenience of parties and witnesses," and "the interest of justice." District courts employ a variety of balancing tests to resolve Section 1404 motions that focus primarily on the convenience factors that Congress identified in the statute, and only consider the existence of a forum selection clause as a factor that is weighed against many others. See *Stewart*, 487 U.S. at 29 ("A motion

to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors."). The district court here, for example, listed eight private and public interest factors that it considered relevant under Section 1404, although it emphasized that these factors were "nonexhaustive." Pet. App. 35a-36a & n.2. The court did identify the forum selection clause as a "factor," but then emphasized that it was "only one" factor and "not entitled to dispositive weight." *Id.* at 36a, 39a.

The use of balancing tests under Section 1404, like the use of discretion itself, wholly eviscerates the purpose and contractual certainty of forum selection clauses. Under Section 1404, parties cannot predict with any confidence whether the forum selection clause in their case will be enforced. This is true notwithstanding this Court's statement in *Stewart*, 487 U.S. at 29, that the presence of a forum selection clause "will be a significant factor that figures centrally in the district court's [Section 1404] calculus." Under a regime where forum selection clauses are merely one "factor" that district courts consider as part of a balancing test that embraces a seemingly endless number of factors, business organizations simply cannot assume their clauses will be enforced. In this regard, although the district court below claimed to have considered the parties' forum selection clause, it did not enforce it and, as the concurring judge below observed, there is "no practical difference between this district court opinion and that of a district court that was assessing this same case without a forum-selection clause." Pet. App. 24a.

The decision below therefore creates a regime in which, unlike other contract provisions, forum selection clauses are not enforced as a matter of

course according to their terms. Instead, enforcement is subject "to the vicissitudes of virtually unfettered judicial discretion." Pet. App. 25a. If permitted to stand, this ruling will have several detrimental consequences for the business community and for business activity. It will frustrate the legitimate contractual expectations of thousands of businesses that have similar clauses in their contracts. No matter what forum these businesses have chosen in their contracts, they now face the prospect that courts in the Fifth Circuit (and other Circuits that follow its approach) will allow a lawsuit to be litigated there, in violation of the parties' agreement. They also face the prospect of costly and time-consuming pre-trial motion practice on venue issues – something that their forum selection clause was designed to avoid.

The greater economic harms, however, will arise with respect to future transactions. If forum selection clauses are not reliably enforced, then businesses will not be able to structure their contracts so as to select in advance and limit the fora in which disputes can be litigated. This will prevent them and their customers from realizing the substantial efficiencies that can be achieved from limiting litigation costs. More importantly, it will discourage certain transactions and forms of business activity altogether. If businesses, particularly small businesses, cannot control and limit their litigation costs through forum selection clauses, they might conclude that certain transactions or business strategies simply are not viable, such as expanding the geographic reach of their operations. Indeed, it is possible that more small businesses would fail if they had to absorb – or pass on to their customers – the costs of litigation in forums across the country. In this regard, Atlantic Marine sought review in this

case because the decision below has substantial consequences for its business model and that of other government contractors that contract with multiple subcontractors from different states to perform the government's work. And of course all of these consequences will harm consumers by depriving them of vendors and service providers, or by driving up the costs of goods and services.

C. The Court Of Appeals' Decision Promotes Forum-Shopping.

The all-too-common practice of breaching forum selection clauses – which generated the instant circuit split – is nothing more than forum-shopping. This tactic is frequently successful in those jurisdictions, such as the Fifth Circuit, that leave to the discretion of district court judges whether to enforce such clauses based on Section 1404's multi-factor balancing test. See Pet. 25 & n.7 (citing decisions in which district courts have declined to enforce forum selection clauses as a matter of discretion).[5] Accordingly, the Fifth Circuit's approach invites and encourages potential evaders of forum selection clauses to pursue their harmful forum-shopping

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[5] Since the Fifth Circuit issued the decision below, district courts in that Circuit already have relied upon it to deny transfer of cases that were filed by plaintiffs in violation of contractual forum selection clauses. *See, e.g., Vasquez* v. *El Paso II Enters., LLC*, No. EP-12-CV-303, 2012 WL 6160986 (W.D. Tex. Dec. 11, 2012); *Shawn Massey Farm Equip., Inc.* v. *CLAAS of Am., Inc.*, No. 4:12-CV-300, 2012 WL 7004153 (E.D. Tex. Dec. 19, 2012) (recommendation of magistrate judge), *adopted*, 2013 WL 418469 (E.D. Tex. Feb. 1, 2013); *see also In re Broadcom Corp.*, No. 141, 2013 WL 1736487 (Fed. Cir. Apr. 23, 2013) (applying Fifth Circuit law and holding, based on decision below, that Texas district court did not abuse its discretion in denying transfer of case filed in violation of a forum selection clause).

strategy, which serves no useful purpose and creates the kind of unfairness this Court has long discouraged. *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 74-77 (1938); *Hanna* v. *Plumer*, 380 U.S. 460, 467-68 (1965).[6]

In addition, the Fifth Circuit's approach promotes forum-shopping because it gives plaintiffs the opportunity to control the law that governs a dispute, even if they are ultimately unsuccessful in controlling the forum. Although many contracts contain choice of law provisions, the background rule in the absence of such a provision is that when a case is transferred pursuant to Section 1404, the original state's choice of law rules transfer as well. See *Van Dusen*, 376 U.S. at 639 ("[T]he transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms."). Thus, even when a federal district court in one of the Circuits that follows the Fifth Circuit's approach transfers a case pursuant to Section 1404 that was filed in violation of a forum selection clause, the plaintiff can still "benefit from the choice-of-law rules of the initial forum." Ryan T. Holt, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 Vand.

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[6] Empirical research confirms that forum-shopping can affect the substantive outcome of cases because the forum in which a case proceeds impacts the result. *See* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 Cornell L. Rev. 1507, 1507 (1995) (analyzing three million federal cases terminated over 13 years and finding that "plaintiffs' rate of winning drops from 58% in cases in which there is no transfer [of venue] to 29% in transferred cases" – an effect which "prevails over the range of substantively different types of cases").

L. Rev. 1913, 1931 (2009); see also *id.* (the plaintiff can thereby gain "a benefit that was not bargained for," even if the forum selection clause is enforced).

In contrast, when a forum selection clause is enforced through a Section 1406 dismissal or transfer, the choice of law rules of the new forum govern. *Id.* at 1931-32. This choice of law consequence provides yet another reason for plaintiffs to ignore forum selection clauses and shop for fora that they believe will be more favorable to them. This Court should reject the Fifth Circuit's approach in order to foreclose injurious forum-shopping and protect the reasonable commercial expectations of parties who enter into forum selection agreements.

II. ENFORCEMENT OF FORUM SELECTION CLAUSES IS FULLY CONSISTENT WITH THE VENUE STATUTES AND THE AUTHORITY THAT CONGRESS HAS GIVEN TO COURTS.

The court of appeals' conclusion that Section 1404 is the only proper vehicle for challenging lawsuits filed in violation of forum selection clauses that contemplate a federal forum is premised in part on its view that allowing private parties to determine venue through contractual agreements somehow encroaches on Congress' purposes in enacting the venue statutes and intrudes on courts' authority to address venue issues. See, *e.g.*, Pet. App. 6a ("private parties should not have the power to transcend federal venue statutes that have been duly enacted by Congress") (internal quotation marks omitted); *id.* at 11a ("institutional concerns cannot be contracted away by private parties"); *id.* at 13a (Congress intended for district courts to "temper[] the private agreement's reflection of private interests with the public interest"). Respondent expressed similar sentiments

in its opposition to the petition. See, *e.g.*, Brief in Opposition at 1 (Feb. 25, 2013) ("[d]istrict courts are not bound by the whim of private parties in determining the manner in which they adjudicate disputes; rather, they are bound by Congress"); *id.* at 15 (private parties "cannot divest the district courts of discretion allocated by Congress and handcuff the judiciary in the administration of justice").

As an initial matter, the panel's concerns about private agreements that "transcend" federal venue statutes are wholly misplaced in this case, where the parties' contractually-specified venue (the Eastern District of Virginia) is undisputedly a permissible venue under the general venue statute that governs diversity cases, 28 U.S.C. § 1391. Section 1391(b)(1) provides that civil actions may be brought in "a judicial district in which any defendant resides." As noted, petitioner (the defendant below) is headquartered in Virginia Beach, Virginia, which is in the Eastern District of Virginia. Thus, petitioner and respondent mutually agreed to limit themselves to one of the permissible venues under Section 1391 – a result that hardly "transcends" or contravenes that statute. See Pet. App. 17a (concurring judge below noting that the parties' forum selection clause "does not replace or contradict § 1391, but instead only limits the parties' prerogative to avail themselves of the full scope of permissive venues that the statute would otherwise provide").

In any event, enforcement of private agreements concerning venue pursuant to the *Bremen* standards is not only fully consistent with the federal venue scheme, but in fact promotes the purposes of that scheme. Several aspects of the federal venue scheme and this Court's decisions interpreting it make this clear.

First, this Court consistently has recognized that the principal purpose of the federal venue statutes is to ensure that cases are tried in locations that are convenient to litigants. See, *e.g.*, *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) (venue statutes "relate[] to the convenience of litigants"); *Leroy* v. *Great W. United Corp.*, 443 U.S. 173, 180 (1979) (venue "is primarily a matter of choosing a convenient forum"); *Wachovia Bank* v. *Schmidt*, 546 U.S. 303, 316 (2006) (venue is "largely a matter of litigational convenience"). Enforcement of forum selection clauses is wholly in line with this purpose because these provisions are written by the parties themselves to express their preferences as to where litigation would be most convenient for them. This is one of the core insights of *Bremen* and the reason why this Court held that there are "compelling reasons" presumptively to enforce forum selection agreements. *Bremen*, 407 U.S. at 12. As this Court explained, such clauses "expressly resolve[] th[e] issue" of which fora the litigants view as most convenient, *id.* at 15, by specifying the fora that are "acceptable to both parties," *id.* at 13. See also *id.* at 12 (noting that the contractually-selected forum represented "[t]he choice" of the parties and that enforcement would therefore "give effect to the legitimate expectations of the parties"); *Stewart*, 487 U.S. at 29 (noting that a forum selection clause represents "the parties' expressed preference for [the contractual] venue").

This Court has further held that another purpose of the venue statutes is to protect *defendants* from the risk that plaintiffs will choose inconvenient fora. See *Leroy*, 443 U.S. at 180 (venue is a "personal privilege[] of the defendant"); *id.* at 183-84 ("the purpose of statutorily specified venue is to protect the

defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial") (emphasis in original); *Neirbo*, 308 U.S. at 168 (venue statute "'accords to the defendant a personal privilege'" (quoting *Commercial Cas. Ins. Co.* v. *Consol. Stone Co.*, 278 U.S. 177, 179 (1929)). Forum selection clauses all but eliminate this risk by permitting *both* parties to select a mutually convenient forum, rather than leaving venue up to the unilateral choice of the party that ends up being the plaintiff. In short, forum selection clauses are wholly consistent with the core purposes of the venue statutes – to ensure that cases are litigated in locations that are convenient to both parties – and their enforcement therefore furthers, rather than encroaches on, Congress' objectives in enacting the federal venue scheme.

Second, the presumptive enforcement of forum selection clauses pursuant to the *Bremen* standards also is fully consistent with the fact that the federal venue statutes, by Congressional design, generally do not establish absolute limits on the venues in which cases can proceed.[7] Instead, they provide considerable leeway for private venue choices to operate.

This Court has provided helpful context for understanding the nature and operation of the federal

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[7] Congress has enacted numerous special venue statutes that prescribe venue for particular types of actions. *See, e.g.*, 42 U.S.C. § 7604(c) (actions under the Air Pollution Control Act may be brought only in the judicial district in which pollution source is located); 16 U.S.C. § 831g (Tennessee Valley Authority condemnation proceedings must be brought in judicial district where land is located). Forum selection clauses typically address disputes governed by Section 1391, the general venue statute, which applies to all civil actions not governed by special venue statutes, including diversity cases (such as the instant case) and federal question cases.

venue statutes by comparing the concepts of venue and subject matter jurisdiction. As the Court has explained, "venue and subject-matter jurisdiction are not concepts of the same order." *Wachovia Bank*, 546 U.S. at 316. Subject matter jurisdiction addresses the "far weightier" matter of "a court's competence to adjudicate a particular category of cases." *Id.* Because the courts' "power to adjudicate" is solely determined by "grant[s] of authority to them by Congress," subject matter jurisdiction is always "beyond the scope of litigants to confer." *Neirbo*, 308 U.S. at 167. In addition, courts have an obligation to ensure that subject matter jurisdiction is proper in each case, by considering the issue on their "own motion, even if no party raises an objection." *Wachovia Bank*, 546 U.S. at 316.

While subject matter jurisdiction can never be created or conferred by the parties' agreement, this Court has long held that venue "is subject to [the parties'] disposition" because it merely "relates to the convenience of litigants." *Neirbo*, 308 U.S. at 168; see also *id.* (noting that "[t]his basic difference between the court's power and the litigant's convenience is historic in the federal courts"); *Leroy*, 443 U.S. at 180; *Wachovia Bank*, 546 U.S. at 316.[8] In particular, the rights conferred by the federal venue statutes are waivable. *Neirbo*, 308 U.S. at 168; *Wachovia Bank*, 546 U.S. at 316; *Leroy*, 443 U.S. at 180; *Hoffman* v. *Blaski*, 363 U.S. 335, 343 (1960); 28 U.S.C. § 1406(b)

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[8] The Court in *Bremen* noted that forum selection clauses had historically been disfavored by many American courts on the ground that "their effect was to 'oust the jurisdiction' of the court." 407 U.S. at 9. As this Court properly recognized, this rationale was misguided and based on a "vestigial legal fiction" because forum selection clauses do not address, and could not "'oust,'" the jurisdiction of any court. *Id.* at 12.

("Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue."). Indeed, under the Federal Rules of Civil Procedure, defendants forfeit venue objections if they do not assert them at their first opportunity in response to the complaint. See Fed. R. Civ. P. 12(b)(3) (defense of "improper venue" must be asserted in responsive pleading or pre-pleading motion to dismiss).

The fact that the rights conferred by the federal venue statutes are waivable means that cases can and sometimes do proceed in federal court venues that are *not* permitted by Section 1391 or other venue statutes.[9] This can occur when the defendant fails to interpose a timely objection. It also can occur when the parties simply agree, formally or informally, to a venue that is not specified in the federal venue statutes. For example, if a plaintiff files suit in a venue that is *not* permitted by Section 1391, the defendant might choose not to object to that forum. See, *e.g.*, *Leroy*, 443 U.S. at 184 (noting that defendants might choose to waive valid venue objections because of "[t]he desirability of consolidating similar claims in a single proceeding"). In this circumstance, the case will proceed in that venue.[10] As noted, 28

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[9] *See, e.g.*, *Herrington* v. *Verrilli*, 151 F. Supp. 2d 449, 456-57 (S.D.N.Y. 2001) (noting that venue was "improperly laid," but that the court "must adjudicate the case" because any objection was waived); *Vintage Grapevine, Inc.* v. *Mara*, 151 F. Supp. 2d 596, 598 n.1 (E.D. Pa. 2001) (questioning the appropriateness of venue, but noting that any objection was waived); *Thompson* v. *United Transp. Union*, 599 F. Supp. 2d 1075, 1077-78 (N.D. Iowa 2008), *aff'd*, 588 F.3d 568 (8th Cir. 2009) (same).

[10] District courts can raise the issue of improper venue *sua sponte*, but not after the defendant has waived the objection.

U.S.C. § 1406(b) expressly contemplates such waivers and, therefore, the litigation of cases in fora not specified by the venue statutes.

Since Congress' venue statutes generally do not provide absolute limits on the venues in which cases can be litigated, and instead allow parties tacitly to agree to litigate their disputes in venues that are *not* permitted by Section 1391, it can hardly offend Congressional prerogatives when parties achieve this same result by agreeing in advance to a mutually preferred forum. Congress provided substantial leeway for private venue choices in its venue scheme, so the enforcement of such choices that are embodied in *ex ante* agreements is consistent with – and in no way "transcends" – the federal venue scheme. In all events, there certainly is no encroachment on Congressional authority when the parties agree to proceed in a venue that *is* permitted by Section 1391, which is what the parties did here.

Third, Congress enacted two amendments to the venue statutes in 2011 that confirm that Congress favors the enforcement of venue choices that are the

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See, e.g., *Stjernholm* v. *Peterson*, 83 F.3d 347, 349 (10th Cir. 1996) (reversing *sua sponte* dismissal of action for lack of proper venue, when defendants had already waived objection); *Concession Consultants, Inc.* v. *Mirisch*, 355 F.2d 369, 371-72 (2d Cir. 1966) (same); 17 *Moore's Federal Practice* § 111.35[3], at 111-170 (3d ed. 2013) ("*At any time before the defendant has waived the objection to improper venue* . . . a district court properly may raise on its own motion the issue of lack of proper venue") (emphasis added); 14D Wright, *supra*, § 3829, at 747-49 ("Although some federal courts say it is proper for the district court to raise the issue of defective venue on its own motion, provided that the parties have an opportunity to present their views on the question, the court *never* should raise the issue after the defendant has waived any venue objection.") (emphasis added) (footnote omitted).

product of consensual agreements.[11] The first amendment modified Section 1404 to allow district courts to transfer cases to districts "to which all parties have consented," in addition to districts where the case might have been brought. See 28 U.S.C. § 1404(a). The House Report explains that Congress sought to expand the range of possible transferee districts by "permit[ting] an action to be transferred to any district or division to which all parties have consented, even if the action could not have been brought in that district or division originally." H.R. Rep. No. 112-10, at 24 (2011). Congress broadened the range of allowable transferee venues so as not to "preclude[] a transfer of the case to a district where it might be more convenient to the litigants." *Id.*

Congress' express amendment of the statute to authorize "transfers upon the parties' consent," *id.*, including to venues not otherwise permitted by the applicable venue statutes, further confirms that Congress does not intend for the venue statutes to limit litigants' ability to select venues that they mutually agree are more convenient. In addition, Congress' explicit endorsement of transfers upon consent to venues that are *not* specified by the venue statutes forecloses any argument that forum selection clauses – such as the one at issue here – that select venues that *are* explicitly permitted by Section 1391 offend any Congressional interests.

The process by which this amendment was proposed and enacted also makes plain that venue choices that are the product of consensual agreement do not intrude on the courts' authority to address venue issues. The 2011 amendments to the venue statutes were "based on recommendations developed

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[11] The instant lawsuit was filed in March 2012.

and approved by the United States Judicial Conference to address the judiciary's concerns" about recurring issues under prior venue law. 157 Cong. Rec. H1367, H1369 (daily ed. Feb. 28, 2011) (Rep. Smith). As explained in the House Report, the Administrative Office of the United States Courts "functioned as a clearinghouse to vet the bill" with all interested stakeholders, including the Judicial Conference's Federal-State Jurisdiction Committee. H.R. Rep. No. 112-10, at 2. Accordingly, the amendment to Section 1404 to accommodate consensual venue agreements was fully endorsed by the judiciary.

The second relevant amendment in 2011 added a definition of venue to clarify that this concept is distinct from subject matter jurisdiction. See *id.* at 17 (noting that the new definition is designed to "distinguish[] venue (a geographic specification of the appropriate forum for litigation) from other provisions of Federal law that operate as restrictions on subject-matter jurisdiction"). Codified at 28 U.S.C. § 1390(a), this definition provides that "the term 'venue' refers to the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general" and "does not refer to any grant or restriction of subject-matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district or districts." Notably, the House Report states that Congress sought to define venue in terms of the geographic location where an action may be brought in order to make it easier to determine whether a defendant has waived venue, "either purposefully *(by contract)* or by inaction through the failure to raise the defense at the first available opportunity." H.R. Rep. No. 112-

10, at 17 (emphasis added). This express reference to *contractual agreements* that address venue, *i.e.*, forum selection clauses, confirms that Congress in fact legislates with such clauses in mind and that it does not view venue choices that are the product of consensual agreements as impairing its authority.

Fourth, assertions that forum selection clauses intrude on courts' authority to address venue issues are similarly misplaced. As an initial matter, this authority must be put into context. As the foregoing discussion demonstrates, under the scheme that Congress created, venue is governed by the litigants' choices in the first instance. The plaintiff selects a venue, and if the defendant acquiesces in that selection or fails to interpose a timely objection, the court does not ever address the issue. Thus, because venue merely "relates to the convenience of litigants," *Neirbo*, 308 U.S. at 168, and not the courts' power, courts are not required to consider venue in every case, and do not consider it in the ordinary course.

In this context, forum selection clauses hardly encroach on judicial authority. They are simply another means for litigants to make the venue choices that Congress has permitted them to make under the scheme it created. As shown, when litigants tacitly agree to a forum, there is no judicial consideration of the issue. Accordingly, when litigants agree to a forum in advance – in order to eliminate uncertainty for themselves – presumptive enforcement of that agreement does not divest the courts of any authority they would otherwise exercise.

This does not mean that courts have no role in determining venue when the parties have entered into a forum selection agreement. As noted, under the *Bremen* standard, forum selection agreements are

"prima facie valid," but this presumption of validity can be rebutted if a party can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Bremen*, 407 U.S. at 10, 15. Thus, when a party seeks to enforce a forum selection clause – such as petitioner did here by filing a motion to dismiss pursuant to Section 1206 and 12(b)(3) when respondent filed its lawsuit in violation of the forum selection clause – the party seeking non-enforcement is free to challenge the clause on any of these grounds. When such a challenge is raised (which was not the case here, Pet. App. 15a), the court can and should fully and carefully scrutinize those claims. If the court finds "overreaching" or that the clause is "unreasonable" under the *Bremen* standard,[12] it can refuse to enforce the clause. Otherwise, however, *Bremen* dictates that the clause be enforced.

Finally, it should be remembered that this Court held that forum selection clauses are presumptively enforceable precisely because they "spar[e]" courts the "time and expense of pretrial motions to determine the correct forum." *Carnival*, 499 U.S. at 594. The Court therefore views less judicial involvement in venue issues as unproblematic because this "conserv[es] judicial resources" that otherwise would be used to resolve venue disputes and allows these resources to be devoted to adjudicating substantive

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[12] This Court held in *Bremen* that a forum selection clause might be "'unreasonable'" if "the chosen forum is *seriously* inconvenient for the trial of the action," but that where the parties "contemplated the claimed inconvenience" at the time of contract formation, such foreseeable inconvenience is not a ground for nonenforcement. 407 U.S. at 16-17 (emphasis in original).

matters. Forum selection clauses are therefore beneficial to courts and their enforcement serves judicial interests as well as the interests of litigants.

CONCLUSION

For these reasons, and those set forth in petitioner's brief, the decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

J-CREW MANAGEMENT, INC.,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED INDUSTRIES OF MASSACHUSETTS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF") and Associated Industries of Massachusetts ("AIM") seek to present their views, and the views of their supporters, on the issue presented in this case, namely how much deference and weight should a federal court sitting in diversity accord a forum selection clause contained within a business-to-business contract.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

AIM is a 97-year-old nonprofit association, with over 5,000 employer members doing business in the Commonwealth. AIM's mission is to promote the well-being of its members and their employees, and

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amici, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), NELF also states that, on May 16, 2013, and on May 21, 2013, counsel for petitioner and counsel for respondent respectively filed with this Court a general written consent to the filing of amicus briefs, in support of either or neither party.

the prosperity of the Commonwealth of Massachusetts, by improving the economic climate of Massachusetts, advocating fair and equitable public policy proactively, and by providing relevant and reliable information and excellent services.

NELF has frequently filed amicus briefs in this Court on the issue of judicial recognition of parties' freedom to contract for the efficient resolution of disputes, such as by selecting in advance a convenient forum or streamlined procedures. *See Oxford Health Plans LLC v. Sutter*, 2013 WL 2459522 (Jun. 10, 2013); *Am. Express. Co. v. Italian Colors Restaurant*, 2013 WL 3064410 (Jun. 20, 2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall St. Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

In this case, enforcement of a contractual choice of venue, agreed upon by businesses of relatively equal bargaining power, serves the common interest of the federal judiciary and private parties in avoiding unnecessary and costly litigation over *where* to litigate disputes. Enforcement of forum selection clauses also serves the shared private and institutional interest in upholding parties' bargained-for expectations and in encouraging the efficient private ordering of affairs, subject to limited judicial review.

A forum selection clause between businesses evinces the parties' clear intent to restrict litigation to a specific, predetermined venue. This contractual choice is typically negotiated freely and is part of the larger give-and-take of a commercial contract. In

the view of amici, the Fifth Circuit in this case has failed to accord the appropriate weight and deference to such a contractual choice under 28 U.S.C. § 1404(a) ("Change of Venue"). If allowed to stand, the Fifth Circuit's decision would undermine parties' settled contract expectations, encourage businesses to evade their contractual duties to restrict litigation to a particular venue, and would deter parties from agreeing to forum selection clauses in the first place.

While the federal judiciary indeed has the power not to enforce a forum selection clause, that power should be exercised cautiously and should be limited to extraordinary circumstances, such as when the party resisting the clause can show that enforcement would cause grave inconvenience that was not foreseeable at the time of contract formation. Absent such a showing of hardship, federal courts should give full effect to the parties' intent by enforcing their choice of venue. For these and other reasons discussed below, NELF and AIM believe that their brief will provide an additional and helpful perspective to aid this Court in deciding the issues presented in this case.

SUMMARY OF ARGUMENT

At issue is the degree of deference and weight a federal court should accord a forum selection clause under 28 U.S.C. § 1404(a). The Fifth Circuit based its decision denying enforcement of the parties' forum selection clause on its interpretation of *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). In the lower court's view, *Stewart* interpreted § 1404(a) as reducing a forum selection clause to only one of many discretionary factors that

a federal court may consider, or disregard entirely, in deciding a motion to transfer venue.

The Fifth Circuit has misinterpreted *Stewart*, which stated clearly that a valid forum selection clause should "figure centrally" in a district court's determination under § 1404(a). In particular, *Stewart* explained that a federal court should consider § 1404(a)'s institutional factors (the convenience of the parties and the interest of justice) in light of, and in the service of, the forum selection clause. Under *Stewart*, enforcement of a freely negotiated forum selection clause, such as the one in this case, is consistent with §1404(a)'s institutional factors and, even more so, advances their aims.

In his *Stewart* concurrence, Justice Kennedy expanded on the majority's recognition of the centrality of forum selection clauses under § 1404(a). In particular, he noted that enforcement of parties' bargained-for expectations serves both the private and institutional interest in avoiding unnecessary and costly litigation over *where* to litigate disputes, and in encouraging parties to agree to a particular venue in their pre-dispute agreements.

Justice Kennedy cited for authority the Court's admiralty decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), which the majority in *Stewart* also recognized as "instructive" on the issue of enforcement of a forum selection clause, under § 1404(a), by a federal court sitting in diversity. In *The Bremen*, the Court held that a forum selection clause that is freely negotiated should be given full effect. *The Bremen* placed the burden properly on the party resisting the clause to show clearly that enforcement would be so gravely

difficult and *unforeseeably* inconvenient that the party would be effectively deprived of his day in court.

The Bremen also recognized that a forum selection clause is often part of a larger *quid pro quo* between businesses, representing one party's compromise or concession in exchange for a favorable term or terms elsewhere in the agreement. A decision allowing a party to avoid the forum selection clause, while still benefiting from other, favorable terms in the agreement, would therefore result in unjust enrichment to that party.

The twin principles of freedom of contract and party autonomy are the driving force of the influential *Bremen* decision. Both the majority and the concurrence in *Stewart* recognized the importance of *The Bremen* and those principles in a federal court's determination of a § 1404(a) motion to transfer venue. Accordingly, a forum selection clause should be enforced according to its terms under § 1404(a). As with any other contract challenge, the burden should fall on the party resisting the clause to prove its invalidity with a generally applicable contract defense, such as a defense to contract formation or a defense of unconscionability--i.e., that enforcement would be so gravely and unforeseeably inconvenient that the party would be effectively deprived of his day in court. Respondent has made no such showing here, and the parties' choice of venue should be enforced.

Such a standard of contract enforcement, derived from both *The Bremen* and foundational principles of contract law, would be consistent with *Stewart*'s recognition that the presence of a forum

selection clause should direct a federal court in its consideration of the institutional factors specified under § 1404(a). Party autonomy is harmonious with, and not antagonistic to, the federal judiciary's superintendence powers under § 1404(a), especially where, as here, parties of relatively equal bargaining power have agreed in advance to a specific federal forum for the resolution of their disputes.

Consistent with this principle of party autonomy, Congress has recently amended § 1404(a) to include, for the first time, an express reference to the parties' consent to a specified venue. Notably, § 1404(a), as written at the time of the *Stewart* decision, made no mention of the parties' ability to agree to the appropriate venue. Congress has thus made express what *Stewart* had inferred from the general language of § 1404(a). In so doing, Congress has indicated that, consistent with *Stewart*, the presence of a forum selection clause should direct a federal court when considering the institutional factors specified under § 1404(a). Congress has indicated that the parties' consent to the appropriate venue becomes the necessary starting point, and the presumptive end point, in a motion to transfer venue.

In sum, both this Court and Congress have recognized the primacy of party autonomy in a motion to transfer venue under § 1404(a) where, as here, the parties have already bargained for the appropriate venue. Since the parties have agreed upon a certain venue, the plaintiff cannot now choose a different venue, unless it can meet its heavy burden of showing either that the clause was defective in its formation or that enforcement of the

clause would effectively deprive the plaintiff of its day in court.

ARGUMENT

I. A VALID FORUM SELECTION CLAUSE SHOULD BE ENFORCED, IN A MOTION TO TRANSFER VENUE UNDER 28 U.S.C. § 1404(a), UNLESS THE PARTY RESISTING THE CLAUSE CAN SHOW THAT ENFORCEMENT WOULD EFFECTIVELY DEPRIVE IT OF ITS DAY IN COURT.

At issue in this contract dispute is the enforcement, in a federal court sitting in diversity, of a forum selection clause freely negotiated between two businesses. The Fifth Circuit declined to enforce the clause, by denying the motion of petitioner, Atlantic Marine Construction Company, to transfer venue to the parties' contractually chosen forum, under both 28 U.S.C. § 1406(a) ("Cure or waiver of defects"), and 28 U.S.C § 1404(a) ("Change of venue").[2] *In re Atlantic Marine Constr. Co., Inc.*, 701 F. 3d 736 (5th Cir. 2012). The lower court concluded that § 1406(a) did not apply where, as here, the

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[2] 28 U.S.C. § 1406(a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

plaintiff has filed suit in a non-contractual venue that is nevertheless proper under the general venue statute, 28 U.S.C. § 1391(b).[3] *See In re Atlantic Marine Constr. Co.*, 701 F. 3d at 738-41. As for petitioner's § 1404(a) motion, the Fifth Circuit concluded that § 1404(a) applied but that the district court did not abuse its discretion in declining to enforce the parties' forum selection clause under that statute. *See id.*, 701 F. 3d at 741-43.

Amici take no position in this brief on the applicability of § 1406(a) to a motion to transfer venue under the circumstances of this case. Instead, amici argue that § 1404(a) is an effective and potent statutory vehicle under which a federal court sitting in diversity should enforce a forum selection clause where, as here, the plaintiff has selected a federal

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[3] 28 U.S.C. § 1391(b) provides:

> (b) Venue in general.--A civil action may be brought in--
>
> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
>
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

venue that may be statutorily permissible but that is barred by the parties' freely negotiated agreement.

The Fifth Circuit based its § 1404(a) ruling on its interpretation of *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). According to the Fifth Circuit, "*Stewart* teaches that Congress has by § 1404(a) removed the lateral transfer of cases among federal courts from the control of private contracts." *In re Atlantic Marine*, 701 F. 3d at 742. In the lower court's view, this Court in *Stewart* interpreted § 1404(a) as reducing a forum selection clause to only one of many discretionary factors that a federal court may consider in a motion to transfer venue. As the Fifth Circuit would have it, *Stewart* even affords a federal court the discretion to *disregard* the forum selection clause altogether when considering the institutional factors specified in § 1404(a), such as the convenience of the parties and the interest of justice. "[These] institutional concerns cannot be contracted away by private parties." *Id.*, 701 F. 3d at 742. According to the Fifth Circuit, then, the parties' contractual choice of an appropriate forum need not have any bearing on a court's consideration of the convenience of the parties and the interest of justice, when deciding a motion to transfer venue under § 1404(a).

But this is not so. Contrary to the Fifth Circuit's decision, this Court in *Stewart* stated clearly that a valid forum selection clause should "figure centrally" in a district court's determination under § 1404(a). "The presence of a forum-selection clause . . . will be a significant factor that *figures centrally* in the district court's calculus [under § 1404(a)]" *Stewart*, 487 U.S. at 29 (emphasis added). In particular, the Court in *Stewart* stated

that a federal court should consider § 1404(a)'s institutional factors in light of, and in the service of, the forum selection clause:

> In its resolution of the § 1404(a) motion in this case, for example, the District Court will be called on to address such issues as the convenience of a Manhattan forum *given the parties' expressed preference for that venue*, and the fairness of transfer *in light of the forum-selection clause* and the parties' relative bargaining power.

Stewart, 487 U.S. at 29 (emphasis added). This passage from *Stewart* indicates that enforcement of a freely negotiated forum selection clause, such as the one in this case, is consistent with §1404(a)'s institutional factors and, even more so, advances their aims. Under *Stewart*, a bargained-for venue is presumptively convenient or appropriate for both parties, and enforcement of the parties' contractual expectations would serve the interest of justice, presumably by providing certainty and predictability of result to private parties and the judiciary alike on the issue.

In his *Stewart* concurrence, Justice Kennedy expanded on the majority's recognition of the centrality of forum selection clauses in a court's § 1404(a) analysis. In particular, he noted that enforcement of parties' bargained-for expectations serves both the private and institutional interest in avoiding unnecessary and costly litigation over *where* to litigate disputes, and in encouraging parties to agree to a venue in their pre-dispute agreements:

> [E]nforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system. . . . The federal judicial system has a strong interest in the correct resolution of these questions, *not only to spare litigants unnecessary costs but also to relieve courts of time-consuming pretrial motions.* Courts should announce and encourage rules that support private parties who negotiate such clauses.

Stewart, 487 U.S. at 33 (Kennedy, J., concurring) (emphasis added).

Accordingly, Justice Kennedy concluded, consistent with the majority's view, that a federal court should apply § 1404(a) "so that a valid forum-selection clause is given controlling weight in all but the most exceptional cases." *Id.* He cited for authority the Court's admiralty decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), which the majority in *Stewart* also recognized as "instructive" on the issue of enforcement of a forum selection clause, under § 1404(a), by a federal court sitting in diversity. *See Stewart*, 487 U.S. at 28, 33. In *The Bremen*, the Court held that a forum selection clause that is freely negotiated, and is therefore generally "unaffected by fraud, undue influence, or overweening bargaining power, . . . should be given full effect." *Id.*, 407 U.S. at 12-13.[4] *The Bremen*

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[4] It should be noted that, in a subsequent admiralty case, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), the Court applied *The Bremen* to uphold a *nonnegotiated* forum

placed the burden properly on the party resisting the clause "[to] clearly show that enforcement would be unreasonable and unjust," *id.*, 407 U.S. at 15, such as by "showing that trial in the contractual forum will be so gravely difficult and [unforeseeably] inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 18.

Essential to this case is that *The Bremen*, which both the majority and concurrence in *Stewart* recognized as influential authority, expressly rejected any *foreseeable* inconvenience as a basis for invalidating a forum selection clause. "Whatever 'inconvenience' Zapata would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting." *The Bremen*, 407 U.S. at 17-18. After all, it is hornbook law that a contract should be enforced to give full effect to the parties' foreseeable expectations, herein with respect to the risk that the parties have knowingly assumed in agreeing to a specified venue *ex ante*. "Under the doctrine of foreseeable expectations, courts interpreting a contract ask what the parties would have reasonably understood to be the limit of their obligations and the *scope of the risk they undertook*, based on the

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selection clause contained in a passenger ticket. *Carnival Cruise*, 499 U.S. at 593. While the forum selection clause in the instant case, and in *The Bremen* and *Stewart*, was freely negotiated between businesses, the Court's decision in *Carnival Cruise* nonetheless suggests that a decision favorable to the forum selection clause in this case would also apply to consumer form contracts. *See Carnival Cruise Lines*, 499 U.S. at 594 (citing *Stewart*, 487 U.S. at 33 (concurring opinion)). *Cf. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (Federal Arbitration Act applies to consumer form contracts and preempts state law effectively requiring class arbitration).

circumstances under which the contract was formed." Jake Linford, *A Second Look at the Right of First Publication*, 58 J. Copyright Soc'y U.S.A. 585, 622-23 (2011) (emphasis added).

Moreover, *The Bremen* recognized that a forum selection clause in a business-to-business agreement, such as in this case, is frequently "a vital part of the agreement, . . . figuring prominently in the [parties' negotiations and monetary] calculations." *The Bremen*, 407 U.S. at 14. That is, a forum selection clause is often part of a larger *quid pro quo* between businesses, representing one party's compromise or concession in exchange for a favorable term or terms elsewhere in the agreement. A decision allowing a party to avoid the forum selection clause, while still benefiting from other, favorable terms in the agreement, would therefore result in unjust enrichment to that party. Conversely, the party seeking enforcement of the forum selection clause would be deprived the benefit of the parties' bargain. In short, failure to enforce a forum selection clause between businesses would upset the parties' settled contract expectations--a carefully negotiated balance of rights and duties that defines the parties' commercial relationship.

Simply put, the twin principles of freedom of contract and party autonomy are the driving force of the influential *Bremen* decision. Both the majority and the concurrence in *Stewart* recognized the importance of *The Bremen*, and the principle of party autonomy, in a federal court's determination of a § 1404(a) motion to transfer venue where, as here, the parties have agreed in advance to the appropriate venue. *See Stewart*, 487 U.S. at 28, 29, 33. Under that principle, a forum selection clause

should be treated on an equal footing with any other contract term and should be enforced according to its terms. And, as with any other contract term, the burden should fall on the party resisting the clause, here the respondent, to prove its invalidity with a generally applicable contract defense. The challenging party may do so only by showing that the contract was defective in its formation (e.g., defenses of fraud or duress), or by showing that enforcement would be unconscionable. *See The Bremen*, 407 U.S. at 12-13, 15, 18. *Cf. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (Federal Arbitration Act allows for general contract defenses to arbitration agreements, such as fraud, duress, and unconscionability). Unconscionability in this context means that enforcement of the clause would impose such grave and unforeseeable inconvenience on the challenging party that he would be effectively deprived of his day in court. *See The Bremen*, 407 U.S. at 17-18. Respondent has made no such showing here, and the forum selection clause should therefore be enforced.

Such a standard of contract enforcement, derived from both *The Bremen* and foundational principles of contract law, would be consistent with *Stewart*'s recognition (by both the majority and concurrence), that the presence of a forum selection clause should direct a federal court in its consideration of the institutional factors specified under § 1404(a). *See Stewart*, 487 U.S. at 29, 33. That is, party autonomy is harmonious with, and not antagonistic to, the federal judiciary's superintendence powers under § 1404(a), especially where, as here, parties of relatively equal bargaining power have agreed in advance to a specific federal

forum for the resolution of their disputes. The parties have already chosen the convenient or appropriate venue for disputes arising under their particular business arrangement. And the interest of justice is best served by enforcing the parties' settled contract expectations, both as an end in itself and as a means to avoid costly pre-trial litigation on the issue, and to encourage parties to order their affairs efficiently by agreeing to forum selection clauses.

Consistent with this principle of party autonomy, Congress has recently amended § 1404(a) to include, for the first time, an express reference to the parties' consent to a specified venue: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought *or to any district or division to which all parties have consented*." 28 U.S.C. § 1404(a) (as amended by Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 204(1), 125 Stat. 764) (emphasis added).[5]

Notably, § 1404(a), as written at the time of the *Stewart* decision, made no mention of the parties' ability to agree to the appropriate venue. *See Stewart*, 487 U.S. at 28 (quoting 28 U.S.C. § 1404(a)

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[5] Section 1404(a), as recently amended, applies to any federal suit filed on or after January 6, 2012. *See* Pub. L. No. 112-63, §§ 205(1), (2)(A). The complaint in this case was filed on March 14, 2012 and, therefore, falls within the amended version of § 1404(a). An electronic copy of the District Court's docket in this case (*J-Crew Mgmt., Inc. v. Atlantic Marine Constr. Co.*, No. 1:12-cv-00228-LY (W.D. Tex.) is available at https://pacer.psc.uscourts.gov.

in full). Nevertheless, *Stewart* interpreted the language of § 1404(a) as being sufficiently broad to cover forum selection clauses in federal diversity suits. *Stewart*, 487 U.S. at 29-30. Congress has thus made express what *Stewart* had inferred from the general language of § 1404(a). In so doing, Congress has indicated that, consistent with *Stewart*, the presence of a forum selection clause should direct a federal court when considering the institutional factors specified under § 1404(a). As with the majority and concurring opinions in *Stewart*, Congress has indicated that the parties' consent to the appropriate venue becomes the necessary starting point, and the presumptive end point, in a motion to transfer venue. Consistent with amici's proposed standard of contract enforcement, above, the amendment to § 1404(a) suggests that, since the parties have already bargained for a particular venue, the plaintiff cannot now choose a different venue, unless he can show clearly that § 1404(a)'s institutional factors weigh heavily against this contractual choice.

In sum, both this Court and Congress have recognized the primacy of party autonomy in a motion to transfer venue under § 1404(a) where, as here, the parties have bargained in advance for the appropriate venue. The parties' freely negotiated choice of venue should guide and limit a federal court in the exercise of its discretion when deciding such a motion. A federal court should respect and enforce this contractual choice, unless the party resisting the forum selection clause can meet its heavy burden of showing either that the clause was defective in its formation or that enforcement of the clause would effectively deprive that party of its day

in court. Since respondent has made neither showing here, the forum selection clause should be enforced.

CONCLUSION

For the reasons stated above, NELF and AIM respectfully request that this Court reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the

Supreme Court of the United States

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PROFESSOR STEPHEN E. SACHS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*[1]

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SUMMARY OF ARGUMENT

The parties in this case defend two sides of a many-sided circuit split. This brief argues that a third view is correct.

If a contract requires suit in a particular forum, and the plaintiff sues somewhere else, how may the defendant raise the issue? Petitioner Atlantic Marine Construction Company suggests a motion under Federal Rule of Civil Procedure 12(b)(3) or 28 U.S.C. § 1406,[2] on the theory that the contract renders venue improper. Pet. Br. 3. Respondent J-Crew Man-

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[1] All parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Duke University School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amicus curiae*.) Otherwise, no person or entity other than the *amicus curiae* or his counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Unless otherwise indicated, all "Rule" references are to the Federal Rules of Civil Procedure, and all statutory references are to Title 28, U.S. Code.

agement, Inc. contends that venue remains proper, and that the defendant's only remedy is a transfer motion under § 1404. Br. in Opp. (BIO) 11.

Both sides are wrong. Forum-selection clauses have no effect on venue, which is defined by statute. While parties can waive their venue objections in advance, they cannot destroy proper venue by private agreement.

At the same time, an exclusive forum-selection clause does more than just inform a court's discretion under § 1404. If the clause is valid and enforceable, it waives the plaintiff's right to sue in an excluded forum, offering the defendant an affirmative defense to liability in that forum and the right to have the suit dismissed.

The Federal Rules already specify the correct method of raising this defense: it must be affirmatively stated in the answer, which the defendant may accompany with an immediate summary judgment motion. See Rules 8(c)(1), 12(b), (a)–(b). Often, as here, the parties' agreement will be incorporated in the complaint. In that case, the defendant may alternatively raise the defense in a pre-answer Rule 12(b)(6) motion to dismiss, or a post-answer Rule 12(c) motion for judgment on the pleadings.

The Rules' default procedures are practical as well as correct. They enable defendants to obtain quick and decisive enforcement of their forum-selection clauses, through the same procedures used to enforce binding prior judgments, settlements, or arbitral awards. And while there may be some practical advantages to treating forum-selection clauses

as if they affected venue, these advantages have been greatly exaggerated—and, in any case, provide no reason to misapply the Federal Rules.

Here, the parties agreed that their disputes "shall be litigated" in state or federal court in Norfolk, Va. J.A. 28. J-Crew violated that agreement by suing in the Western District of Texas. Assuming, as the Court should, that the clause at issue is valid and enforceable, the complaint could have been dismissed by motion under Rule 12(b)(6). Instead, Atlantic Marine made this forum-selection defense under the label of Rule 12(b)(3). That may have been good enough to raise the issue, but the Court should leave such preservation questions to the court of appeals in the first instance. Because that court (and the district court) proceeded on the erroneous assumption that § 1404 was the only available remedy, this Court should identify the correct procedure, vacate the judgment, and remand the case for further proceedings.

ARGUMENT

I. Forum-Selection Clauses Cannot Render Improper a Statutorily Proper Venue.

A. Proper venue is defined by statute.

In ordinary speech, "venue" often serves as a general term for "place" (as in a "wedding venue"). As forum-selection clauses concern the proper *place* of litigation, it may be natural to think—as Atlantic Marine argues, and as a number of the courts of appeals have ruled—that such clauses also determine the proper *venue*.

But that is a mistake. The term "venue," as it appears in the Federal Rules and in Title 28, is a term of art, defined to "refer[] to the geographic specification" by Congress of particular courts "for the litigation of a civil action." § 1390(a). In each case, venue is "statutorily specified," *Leroy* v. *Great W. United Corp.*, 443 U.S. 173, 183 (1979), as proper or improper in a given judicial district regardless of what the parties have agreed.

That conclusion flows directly from the statutory text. Section 1391, the general venue statute, provides that "[a] civil action *may* be brought in" various judicial districts. § 1391(b) (emphasis added). Just as the Federal Rules "regularly use 'may' to confer categorical permission," so do various "federal statutes that establish procedural entitlements" for one party or another. *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010). Section 1391's use of "may" falls in the same category. Like other Rules and statutes, it "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim," *ibid.*—at least insofar as venue is concerned.

A judicial district that Congress has identified as a "proper venue for a civil action," § 1391(a)(2), therefore does not become an "improper venue," Rule 12(b)(3), or a "wrong" venue, § 1406(a), simply because the parties privately agreed to sue somewhere else. Rather, the procedural entitlements conferred by the general venue statute "govern the venue of *all* civil actions brought in district courts of the United States," "[e]xcept as otherwise provided *by law*." § 1391(a)(1) (emphasis added).

Rejecting this reasoning, Atlantic Marine treats any suit filed in the incorrect *place* as having wrong or improper *venue*—emphasizing the plain meanings of "wrong" and "improper." Pet. Br. 15 & n.5. The plain meanings of those adjectives are beside the point, because what matters is the *technical* meaning of "venue." Indeed, reading forum-selection clauses to destroy statutory venue would make a hash of a detailed legislative scheme. For example:

- Forum-selection clauses are particularly helpful in international agreements, when at least one of the parties resides abroad. Cf. *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 13–14 (1972) (describing forum selection as "an indispensable element in international trade, commerce, and contracting"). But Congress has specified that, "for all venue purposes," § 1391(c), a defendant residing outside the United States "may be sued in any judicial district" and should be "disregarded in determining where the action may be brought with respect to other defendants," § 1391(c)(3). If forum-selection clauses change where venue lies, then either § 1391(c) does not really control "for all venue purposes" like it says, or else such clauses are inoperative just when they might be most needed.

- The agreement here permits a federal forum, see J.A. 28, but the parties could just as easily have specified a state or foreign court instead. In that case, under Atlantic Marine's view, venue would be improper in every federal judicial district. Pet. Br. 18–19. But Congress enacted a fallback venue statute to guarantee that, "[e]xcept as other-

wise provided by law," § 1391(a), and in any case within the federal courts' personal jurisdiction, venue will always lie in *some* judicial district should there be "no district in which an action may otherwise be brought as provided in this section." § 1391(b)(3); cf. *Brunette Machine Works, Ltd.* v. *Kockum Indus.*, 406 U.S. 706, 710 n.8 (1972) ("Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other.").

- When a case is removed from state to federal court, the general venue statute does not apply. See § 1390(c). Instead, the case can typically be removed only to a particular court, "the district court of the United States for the district and division embracing the place where such action is pending." § 1441(a). Suppose, for example, that J-Crew had sued in state court in Bell County, Texas, and that Atlantic Marine had removed to the Western District to enforce its forum-selection agreement there. Because the clause selects a different district, venue would allegedly be improper in the removal court—even though § 1441(a) renders venue automatically proper in the forum designated by statute. *Polizzi* v. *Cowles Magazines, Inc.*, 345 U.S. 663, 665–66 (1953); see also 17 Moore's Federal Practice § 111.36[5][a], at 179 (3d ed. 2013) (Moore).

These results are difficult to square with the framework created by Congress.

By contrast, applying that framework straightforwardly makes the venue analysis here easy. The

parties' contract called for a construction project in the Western District of Texas. See Pet. App. 4a n.10. That project was a "substantial part of the events * * * giving rise to the claim," § 1391(b)(2), so the case "may be brought" in the Western District, § 1391(b), at least as far as venue is concerned. See *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000) (noting, in a suit alleging breach of contract, that venue under the substantial-part standard is "clearly proper" in a district "within which the contract was performed").

B. A venue that is proper under § 1391 is not "wrong" under § 1406.

Atlantic Marine does not claim that the venue statutes actually contain some invisible-ink exception for forum-selection clauses. Instead, it tries to shoehorn forum selection into § 1406, which permits dismissal or transfer by a district court "in which is filed a case laying venue in the wrong division or district." § 1406(a). Atlantic Marine contends that "wrong" refers to *any* defect in the forum (*e.g.*, lack of personal jurisdiction), not just whether the suit was filed "contrary to the venue statutes." Pet. Br. 9, 15.

This claim implicates a wholly different circuit split,[3] and in any case it is incorrect. Applying § 1406

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[3] Compare, *e.g.*, *In re Carefirst of Md., Inc.*, 305 F.3d 253, 255–56 (CA4 2002) (accepting this "broad construction" of § 1406(a), though the statute's "language suggests otherwise"), with *Viernow* v. *Euripides Dev. Corp.*, 157 F.3d 785, 793 (CA10 1998) (rejecting this reading as "strained"); see also 17 Moore § 111.02[1][b][ii][B], at 23. Note that *none* of the cases cited at Pet. Br. 15–16 discuss § 1406 in this context.

to every defect in the forum would read "laying venue" out of the statute—as if the text simply referred to any case "filed * * * in the wrong division or district."[4] Instead, this Court has always described § 1406 as specifically addressing *venue*. The section "authorize[s] the transfer of cases, however wrong the plaintiff may have been in filing his case *as to venue*, whether the court in which it was filed had personal jurisdiction over the defendants or not." *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463, 466 (1962) (emphasis added); see also *ibid.* (§ 1406 designed to prevent injustice resulting from an "erroneous guess" as to facts "upon which *venue provisions* often turn" (emphasis added)); accord *Henderson* v. *United States*, 517 U.S. 654, 667 (1996); *Johnson* v. *Ry. Exp. Agency, Inc.*, 421 U.S. 454, 466 n.12 (1975); Reviser's Note to § 1406, 28 U.S.C. at 803 (Supp. 2. 1949) (§ 1406(a) permits transfer "where venue is improperly laid").

Atlantic Marine's attempt to "blur" venue with other concepts under § 1406 is not just "unfortunate," 14D C. Wright et al., Federal Practice and Procedure: Jurisdiction § 3827, at 579–80 (3d ed. 2007) (Wright); it would also render other statutes mere surplusage. If a case "lay[s] venue in the wrong * * * district" whenever jurisdiction is absent, then Congress would not have needed a separate statute to permit transfers for "want of jurisdiction," see § 1631, or to avoid "'jurisdictional' dismissals" under the Suits in Admi-

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[4] Venue was restricted by division, as well as by district, when Congress enacted § 1406. See § 1393 (Supp. 2 1949) (repealed 1988).

ralty Act, see *Henderson*, 517 U.S. at 667 (citing 46 U.S.C. App. § 742 (1994), codified as amended at 46 U.S.C. § 30906(b)). Likewise, if "wrong" and "improper" mean largely the same thing, see Pet. Br. 15 & n.5, and if any defective forum is a "wrong 'venue,'" *ibid.*, then Rule 12(b)(3) would render 12(b)(1) and (2) unnecessary—"lack of subject-matter jurisdiction" and "lack of personal jurisdiction" would both just be species of "improper venue."

Section 1406—like the rest of Title 28, Chapter 87—is about venue, not jurisdiction or other defects. And a case brought where § 1391(b) says it "may be brought" does not "lay[] venue in the wrong division or district." § 1406(a).

C. Parties cannot render a proper venue improper by contract.

Alternatively, Atlantic Marine portrays forum-selection clauses as displacing standard venue analysis through the parties' consent. Pet. Br. 12. That is not how venue works.

As this Court has explained, "personal jurisdiction [and] venue * * * are personal privileges of the defendant" against suit. *Leroy*, 443 U.S. at 180. These privileges, of course, "may be waived by the parties." *Ibid.*; cf. Pet. Br. 11–12. But neither privilege may be *expanded* by the parties, because the scope of each privilege is determined by law. In other words, a party may consent to venue or jurisdiction as a potential defendant, giving up its right to assert certain legally defined privileges later. But that party cannot, as a potential plaintiff, "give up" the fact that venue lies in a given district—any more than it can

"give up," in advance, the district court's personal jurisdiction over a defendant. See *The Bremen*, 407 U.S. at 12 ("No one seriously contends * * * that the forum-selection clause 'ousted' the District Court of jurisdiction * * * ."); cf. Restatement (Second) of Conflict of Laws § 80, cmt. *a* (rev. ed. 1988) ("Private individuals have no power to alter the rules of judicial jurisdiction.").

A party may also waive individual *arguments* about venue. One judge of the court of appeals described the parties as agreeing "that neither will seek to maintain venue" in certain fora. Pet. App. 17a (Haynes, J., concurring in the judgment). But even if venue were J-Crew's burden to "maintain" (it may not be),[5] nothing in the parties' agreement estops J-Crew from "maintain[ing]" venue wherever venue lies. The agreement promises that a dispute "shall be litigated in" Norfolk and consents to jurisdiction and venue there. J.A. 28. It makes no representations about venue in other districts, any more than about personal or subject-matter jurisdiction; and if it had, reliance would have been unreasonable in light of § 1391. Even a contract choosing a particular forum and reciting that venue is improper in every other district would not necessarily make it so. A court is

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[5] There is another circuit split on which party bears the burden of establishing proper or improper venue. Compare, *e.g.*, *Gulf Ins. Co.* v. *Glasbrenner*, 417 F.3d 353, 355 (CA2 2005) (plaintiff's burden), with *In re Peachtree Lane Assocs.*, 150 F.3d 788, 792 (CA7 1998) (defendant's burden); *Myers* v. *Am. Dental Ass'n*, 695 F.2d 716, 724–25 (CA3 1982) (same); see also 2 Moore's Federal Practice § 12.32[4], at 66; 17 *id.* § 110.01[5][c], at 22.

"not bound to accept, as controlling, [the parties'] stipulations as to questions of law," *Sanford's Estate* v. *CIR*, 308 U.S. 39, 51 (1939)—especially when the correct answers to those questions are obvious from the face of the complaint.

Perhaps J-Crew is equitably estopped from *suing* in other courts more generally. See Staring, *Forgotten Equity: The Enforcement of Forum Clauses*, 30 J. Mar. L. & Com. 405 (1999); see also *Dickerson* v. *Colgrove*, 100 U.S. 578, 580 (1879) ("[H]e who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted."). But that simply proves the point—for estoppel, in that sense, is not a defect in venue, but rather an affirmative defense. See Rule 8(c)(1) ("estoppel").

Again, Atlantic Marine's argument as to venue would work just as well (or poorly) for jurisdiction. This Court has said that the party asserting jurisdiction bears the burden of proof. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 & n.3 (2006) (subject-matter jurisdiction); *Ins. Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 709 (1982) (personal jurisdiction). A prior agreement not to "maintain" jurisdiction, no matter how obvious the law, does not cause jurisdiction to be absent through a failure of proof. Otherwise, the parties could "oust" the courts' jurisdiction in precisely the way that *The Bremen* rejected. Given that parties cannot strip courts of jurisdiction by contract, they cannot strip judicial districts of statutorily specified venue either.

Forum-selection clauses therefore have no more to do with "venue"—other than in the loose sense of "place"—than they do with personal or subject-matter jurisdiction. Objections based on such clauses fit no better under Rule 12(b)(3) or § 1406 than they do under Rule 12(b)(1) or (2)—that is, not at all.

II. An Enforceable Forum-Selection Clause May Be Raised as an Affirmative Defense.

According to J-Crew, if a forum-selection clause does not destroy proper venue, then the only remedy left for the plaintiff's breach of the clause is a transfer motion under § 1404. BIO 11.[6]

That does not follow. Forum-selection clauses are not an unprovided-for case under the Federal Rules. Rather, the Rules already specify the correct enforcement procedure: a forum-selection clause must be raised as an affirmative defense.

A. The Rules already provide a method for raising forum-selection defenses.

An exclusive forum-selection clause is exactly what it sounds like: a contractual agreement that consents to litigation in a particular forum and relinquishes the parties' right to select any other forum. The exclusive nature of the clause makes it a form of waiver, "the 'intentional relinquishment or abandonment of a known right.'" *Wood* v. *Milyard*, 132 S. Ct. 1826, 1835 (2012) (quoting *Kontrick* v. *Ryan*, 540 U.S. 443, 458 n.13 (2004)). If the clause is valid and

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[6] Or, perhaps, a separate suit for damages. See Pet. App. 25a n.5 (Haynes, J., concurring in the judgment).

enforceable, it serves as a defense to the plaintiff's claim. Specifically, it is an affirmative defense—a reason to deny judgment to the plaintiff that remains valid "even if all the allegations in the complaint are true," Black's Law Dictionary 482 (B. Garner ed., 9th ed. 2009), or that the defendant "cannot raise by a simple denial in the answer," 5 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1271, at 585 (3d ed. 2004) (Wright & Miller).

Under the general default established by Rule 8, "*any* avoidance or affirmative defense" must be "affirmatively state[d]" in the defendant's answer. Rule 8(c)(1) (emphasis added).[7] This is the standard method for raising defenses under the Rules: except for seven special defenses that may be raised "by motion," "[*e*]*very* defense to a claim for relief * * * must be asserted in the responsive pleading." Rule 12(b) (emphasis added). Were there any doubt, the Rules also provide examples of affirmative defenses, with "waiver" specifically included on the list. Rule 8(c)(1).

That a forum-selection clause offers an affirmative defense does not mean, however, that a defendant must always go to trial to enforce it. When a forum-selection clause raises "no genuine dispute as to any material fact"—say, because its authenticity is undisputed, and the only disagreements involve pure questions of law—the defendant may immediately

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[7] Cf. Black's Law Dictionary, *supra*, at 156, 339 (defining "avoidance," under "confession and avoidance," as "[a] plea in which a defendant admits allegations but pleads additional facts that deprive the admitted facts of an adverse legal effect").

file a motion for summary judgment under Rule 56(a). There is no waiting period for summary judgment motions; the defendant can file one contemporaneously with its answer, if it wishes. See Rule 56(b); cf. Advisory Committee's Notes, 28 U.S.C. app. at 268 (2006).[8]

In many cases (including this one), the defendant will not even need to answer the complaint, because the case can be dismissed by pre-answer motion under Rule 12(b)(6). "A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief"—such as "when an affirmative defense . . . appears on its face." *Jones* v. *Bock*, 549 U.S. 199, 215 (2007) (internal quotation marks omitted; omission in original). For Rule 12(b)(6) purposes, the complaint's allegations include material "incorporated into the complaint by reference." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). In most contract cases, the parties' agreement is "integral to the claim," and it will be attached to the complaint as an exhibit "whose authenticity is unquestioned"—making it "part of [the] complaint by implication." 5B Wright & Miller § 1357, at 376; *id.* at 186 (Supp. 2013). That permits enforcement of the clause through Rule 12(b)(6), or alternatively through a

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[8] Should that motion be denied, nothing in the Federal Rules stops the defendant from filing another summary judgment motion on the merits later on. Courts often accept successive summary judgment motions when there is good cause to do so. See 11 Moore § 56.121[1][b], at 300 & n.5.

Rule 12(c) motion for judgment on the pleadings. See Rule 12(h)(2)(B); 5C Wright & Miller § 1367, at 207.

Thus, while the particular motion filed depends on the contents of the complaint, the Rules leave little doubt about the general approach. A forum-selection clause should be processed in the same manner as any other defense that justifies the denial of relief but that is not specifically listed in Rule 12(b).

Indeed, this is the same procedure that defendants must use to enforce various other rights not to litigate—for example, because they have already settled the plaintiff's claim, or already resolved the issue in arbitration, or even already litigated the claim or issue to judgment in a prior case and won. "Release," "arbitration and award," "res judicata," and "estoppel" are all affirmative defenses under Rule 8(c)(1). Unless these defenses are apparent from the complaint or matters for judicial notice, defendants cannot make them under Rule 12(b)(6) or 12(c) and must resort to summary judgment or trial. Yet the default procedures of the Federal Rules still protect such defendants from unjustified litigation.

In the same way, these default procedures provide parties that have agreed on a particular forum with the full measure of certainty and predictability described by *The Bremen*. See 407 U.S. at 13–14. If the case is filed in the wrong forum, the defendant has a right to have it dismissed, and an adequate procedure under the Federal Rules for enforcing that right.

B. This Court's decisions are best read as treating a forum-selection clause as an affirmative defense.

Treating a forum-selection clause as an affirmative defense is consistent not only with the text of the Rules but also with this Court's jurisprudence. The Court has repeatedly stated that forum-selection clauses can justify dismissal, but it has never suggested that they do so by rendering *venue* improper. The Court did enforce a forum-selection clause in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), in which the original motion for summary judgment had asserted a venue defect under § 1406, see *Shute* v. *Carnival Cruise Lines*, 897 F.2d 377, 379, 387 (CA9 1988). But the Court's opinion never mentioned either § 1406 or the word "venue," and it can hardly be read as endorsing that theory.[9]

By contrast, in *Stewart Organization, Inc.* v. *Ricoh Corp.*, the Court approvingly noted the parties' understanding that a § 1406 motion to dismiss "for improper venue" had been "properly denied * * * [,] because respondent apparently does business in the [district]." 487 U.S. 22, 27 n.8 (1988). Atlantic Marine portrays this statement as a mere summary of the

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[9] Likewise, in *Kawasaki Kisen Kaisha Ltd.* v. *Regal-Beloit Corp.*, the Court enforced a forum-selection clause without specifying what motion had been filed in the district court. See 130 S. Ct. 2433, 2440 (2010). The Court's only discussion of venue was in explaining that the statutory venue provisions of the Carmack Amendment, 49 U.S.C. § 11706(d), did not apply to that case. See 130 S. Ct. at 2441–42.

parties' positions, Pet. Br. 23. But the Court's words in *Stewart* carry far more weight than its silence about the proper motion in *Shute*. The *Stewart* Court recognized that statutory venue would lie irrespective of what the parties had agreed.

Moreover, rather than suggesting that forum-selection clauses render venue improper, this Court has traditionally described such clauses as conferring a contractual right to dismissal. Although the petitioner in *The Bremen* had originally "moved to dismiss for lack of jurisdiction," 407 U.S. at 4, the Court rejected any jurisdictional "ouste[r]" theory, see *id.* at 12, and instead framed the issue as one of specific performance of the contract: "The correct approach would have been to enforce the forum clause specifically * * * ." *Id.* at 15.

Similarly, in *Lauro Lines s.r.l.* v. *Chasser*, the Court described the defendant as having a "contractual right to [a particular] forum," 490 U.S. 495, 499 (1989), and as seeking to have its "agreement * * * enforced by the federal courts," *id.* at 501. (The petitioner in *Lauro Lines* had originally filed a motion to dismiss "pursuant to Rules 12(b) and 56." Appendix in No. 88-23, pp. 2–3.) The Court repeated this depiction in *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, where it described the forum-selection clause in *Lauro Lines* as conferring a "contractual right to limit trial to [a particular] forum." 511 U.S. 863, 874 (1994).

The Court has also explained that the contractual right conferred by a forum-selection clause justifies dismissal rather than transfer to another court. In *Lauro Lines*, the Court noted that a

district court's failure to respect the clause would be reversible error, which may be raised on "appeal after final judgment" just like "a claim that the trial court lacked personal jurisdiction over the defendant." 490 U.S. at 501; see also *id.* at 502–03 (Scalia, J., concurring) (describing the remedy for an erroneously denied motion as "permitting the trial to occur and reversing its outcome"). Because this contractual right can preclude the defendant's liability without necessarily contradicting the plaintiff's complaint, it must be raised as an affirmative defense.[10]

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[10] Some courts of appeals have adopted a similar approach. In *Central Contracting Co.* v. *Maryland Casualty Co.*, the Third Circuit described a forum-selection clause as "merely constitut[ing] a stipulation," whereby "the parties join in asking the court to give effect to their agreement." 367 F.2d 341, 345 (CA3 1966). That case arose on a 12(b)(6) motion, which the Third Circuit properly converted to a motion for summary judgment under Rule 56. See *id.* at 343. The First Circuit then relied on *Central Contracting* when it endorsed the use of a Rule 12(b)(6) motion, see *LFC Lessors, Inc.* v. *Pac. Sewer Maint. Corp.*, 739 F.2d 4, 6–7 (CA1 1984), and it has maintained that rule to this day, see *Rivera* v. *Centro Médico de Turabo, Inc.*, 575 F.3d 10, 15–16 (CA1 2009); *Silva* v. *Encyclopedia Britannica Inc.*, 239 F.3d 385, 387–88 (CA1 2001); cf. *Langley* v. *Prudential Mortg. Capital Co.*, 546 F.3d 365 (CA6 2008) (*per curiam*) (permitting 12(b)(6) or § 1404); 14D Wright § 3803.1, at 112 & n.72 (3d ed. 2007 & Supp. 2013) ("The better view * * * is that a forum selection clause does not render venue improper in an otherwise proper forum and that a valid clause should be enforced by either a Section 1404(a) transfer or a Rule 12(b)(6) motion to dismiss for failure to state a claim.") (citing cases).

C. The affirmative-defense procedure is practical as well as correct.

On a natural reading of the Rules, forum-selection clauses must be raised as affirmative defenses. Surprisingly, few courts and commentators have mounted serious arguments to the contrary. Some have failed to consider the affirmative-defense theory, assuming § 1404 to be the only alternative to a venue approach. See, *e.g.*, Pet. App. 5a. Others have dismissed the theory out of hand based on a misreading of *Stewart*.[11] Most, however, have rejected it for reasons unrelated to the text, preferring to use venue concepts based on an imagined balance of practical costs and benefits—reasons to *call* the issue venue, even if it isn't. See, *e.g.*, *Sucampo Pharms., Inc.* v. *Astellas Pharma, Inc.*, 471 F.3d 544, 549 (CA4 2006); *Argueta* v. *Banco Mexicano, S.A.*, 87 F.3d 320, 324 (CA9 1996); see also Pet. App. 24a (Haynes, J., concurring in the judgment) (searching for "the cleanest way" to enforce the clause); cf. Pet. Br. 17–18.[12]

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[11] See, *e.g.*, *Lipcon* v. *Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290 (CA11 1998) (finding "no significant doctrinal error" in using Rule 12(b)(6), but preferring 12(b)(3) based on the non sequitur that *Stewart* arose under § 1404, a "transfer-of-*venue* statute").

[12] See also, *e.g.*, 17 Moore § 111.04[3][b][i]–[ii], [4][c], at 39–43, 52.3–.6; Davies, *Forum Selection Clauses in Maritime Cases*, 27 Tul. Mar. L.J. 367, 369–72, 375 (2003); Staring, *supra*, at 408; Holt, Note, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 Vand. L. Rev. 1913, 1924–25 (2009).

The Rules do set out a number of procedures for handling venue that might be convenient if applied to forum-selection clauses. For example, venue objections:

- may be raised before answering the complaint, see Rule 12(b)(3);
- may rely on evidence outside the complaint, see Rule 12(d);
- are waived if raised too late, see Rule 12(h)(1);
- have contested facts determined by the court, not a jury, see Rule 43(c); and
- result in dismissals that are not "on the merits," Rule 41(b).

Even on their own practical terms, however, these concerns are largely overblown or misguided. And, in any case, they offer no reason to ignore the Federal Rules.

Timing. Treating a forum-selection clause as an affirmative defense may seem like a catch-22. The defendant still has to answer the complaint in the plaintiff's chosen forum, properly stating the defense under Rule 8(c)(1), just to assert its right not to litigate there in the first place.

But this sells the pleading process short. As noted above, the Rules expect just the same of defendants that have already settled the case, completed an arbitration, or litigated the case to judgment and won. See Rule 8(c)(1) (listing "release," "arbitration and award," "res judicata," and "estoppel"). Each of these defenses presents just as much need for certainty and repose as does a forum-selection clause. If

a defendant that has *already settled the case* still has to file an answer and a summary judgment motion, then that is not too much to expect from a defendant that merely claims the contractual right to litigate in a different forum.

In most forum-selection cases, moreover, the agreement is incorporated in the complaint, and the defendant may move to dismiss under Rule 12(b)(6) before filing an answer. Sometimes the parties might have entered into a wholly separate agreement on forum selection, which likely would not be so incorporated. But even if the defendant has to use summary judgment, Rule 56(b) places no limit on how early such a motion may be brought. Given that *Shute* itself arose on a motion for summary judgment, see 499 U.S. at 588, it is hard to portray this procedure as inadequate.

Evidence. On a Rule 12(b)(6) motion, the court assumes the truth of the complaint's well-pleaded allegations, and will not accept other evidence without converting the motion to one for summary judgment under Rule 56. Two courts of appeals have relied on these grounds to find Rule 12(b)(6) inappropriate for forum selection—reasoning that, in order to attack the clause under *The Bremen*'s standards (*e.g.*, for fraud), the plaintiff will usually need to cite evidence outside the complaint. See *Argueta*, 87 F.2d at 324; accord *Sucampo*, 471 F.3d at 549; Pet. Br. 18.

This objection proves too much. A plaintiff might need extra-complaint evidence whenever an affirmative defense is asserted under Rule 12(b)(6). Consider a statute of limitations defense: the

defendant might have agreed to waive that defense in an earlier proceeding, see, *e.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 242 (1981), and evidence of that waiver would almost always be outside the complaint. Any need for outside evidence is easily handled under Rule 12(d), which provides the parties with a "reasonable opportunity" to develop and present the facts.[13]

Indeed, conversion of a Rule 12(b)(6) motion to summary judgment under Rules 12(d) and 56 is hardly a catastrophe. If there were a true factual dispute over the validity of the clause—say, whether it had been inserted by fraud, or whether the plaintiff's signature on the agreement was forged—then facts will need to be gathered, whether through "jurisdictional discovery" or actual discovery. Calling the forum-selection question "venue" does not make the factual problem go away. Federal courts can and should structure discovery to answer the forum-selection question first, before digging into the merits as a whole. See Rules 16(b), 26(b)(2)(C).

Waiver. A venue defect must be raised in the answer or pre-answer motion or else it is waived.

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[13] Alternatively, if the complaint happens to anticipate an alternative defense (say, by alleging that the forum-selection clause was inserted by fraud), and those allegations are not struck as surplusage, see 5 Wright & Miller § 1276, at 623–24, then taking the allegations as true is obviously the right thing to do on a 12(b)(6) motion. The pleaded fact is plainly in dispute, and it is reasonable for the court to expect affidavits or admissible evidence on the subject before enforcing the clause. See Rule 56(c)(2), (4).

Rule 12(h)(1). By contrast, failure to state a claim—once pleaded in the answer—may be raised by motion for judgment on the pleadings or even "at trial." Rule 12(b), (h)(2)(B)–(C). That might seem inappropriate for forum selection: if a case truly belongs somewhere else, the defendant should not wait for a full-blown trial before pressing the issue. See Pet. Br. 17–18.

That objection misconceives the waiver rule. Defendants waive venue under Rule 12(h)(1)(A) only by filing Rule 12(b) motions on *other* grounds. Nothing stops them from pleading improper venue in the answer and then waiting to press it at trial. See Rule 12(h)(1)(B)(ii). Mislabeling forum selection as venue, then, hardly guarantees a quick resolution.

More importantly, whatever the procedural vehicle used, a defendant's right to raise a waiver defense (including a forum-selection clause) is itself limited by ordinary waiver doctrines. An affirmative defense is waived if not pleaded in the answer. See Rule 8(c)(1); 2 Moore § 8.08[3], at 62. And a defendant can waive defenses by its conduct, as well as by formal omission. See *Democratic Republic of Congo* v. *FG Hemisphere Assocs.*, 508 F.3d 1062, 1064–65 (CADC 2007) (citing cases). For example, when parties have agreed to arbitration but the plaintiff sues anyway, 9 U.S.C. § 3 imposes no time limit on the defendant's motion to compel arbitration. But a defendant that waits too long to file, acting inconsistently with its arbitration right by continuing to litigate in the plaintiff's chosen forum, may be found to have waived that right. 13D Wright § 3569, at 526–28 & nn.83–84 (3d ed. 2007 & Supp. 2013); see also *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 25

(1983) (describing "waiver" and "delay" as "defense[s] to arbitrability"). The same is true of a late-filed forum non conveniens motion. 14D Wright § 3828, at 627 & n.17.

So here. A defendant that waits too long to demand its chosen forum, preferring to litigate in the forum the plaintiff picked, will waive its right to litigate elsewhere. See, *e.g.*, *Frietsch* v. *Refco, Inc.*, 56 F.3d 825, 830–31 (CA7 1995). Courts have long enforced this standard as a matter of equity in the contexts of arbitration or forum non conveniens, even without the hard-and-fast limits of Rule 12(h)(1). Because equitable waiver doctrines continue to apply, it is hard to imagine circumstances in which a defendant could successfully "lie behind the log" and delay the enforcement of a forum-selection clause.

Jury trial. When venue is raised by motion, any facts relevant to the defense are determined by the court, usually on affidavits. See Rule 43(c); 14D Wright § 3826, at 555 & n.20. By contrast, if an affirmative defense presents a genuine dispute of material fact, it cannot be resolved by motion under Rules 12 or 56. If the case is jury-eligible and a party so demands, the issue has to go to the jury. See Rules 38, 39(a). Why should the parties have to endure a jury trial, just to find out where they should *start* the litigation?

This procedure may seem strange. See Pet. Br. 17–18. But every reason supporting jury trials in general also supports such a right here. If the validity and enforceability of a forum-selection clause rests on genuinely disputed facts—say, whether the plaintiff ever signed the agreement in the first

place—then the plaintiff may have a right to have those facts determined by a jury, not a judge. (Under the Federal Arbitration Act, by comparison, "[i]f the making of the arbitration agreement * * * be in issue," then the matter may have to be resolved by jury trial, 9 U.S.C. § 4—even though a crucial goal of arbitration is to obtain speedy process outside the courts.)

Most of the time, of course, there will not be *any* relevant facts in dispute (as here), or the dispute over those facts will not be genuine. In such cases, the clause's validity can be resolved quickly by the court on motion rather than by a jury. And even when there are genuine disputes, the parties would not have to wait for a trial of the whole cause, as a district court can and should order a separate trial under Rule 42(b).

Merits. The most fundamental objection to treating forum-selection clauses as affirmative defenses is that defenses ought to concern the merits, while forum selection concerns only the place of suit. Pet. Br. 18. And theoretical scruples aside, there are practical differences as well. A dismissal based on an affirmative defense, unlike one for venue, typically "operates as an adjudication on the merits." Rule 41(b). But not every plaintiff, having been kicked out for going to the wrong court, should be forever foreclosed from going to the right court.

In fact, this dismissal issue is a red herring. A court can always issue a dismissal without prejudice if it chooses. See *ibid.* ("Unless the dismissal order states otherwise, * * * ."). Moreover, for purposes of the Civil Rules, an "adjudication on the merits" un-

der Rule 41 means only that the plaintiff cannot "return[] later, to the *same* court, with the same underlying claim." *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (emphasis added). Whether that is "sufficient" to bar the claim in *other* courts does not depend on Rule 41, but on the ordinarily applicable doctrines of preclusion—which might differ based on the forum State or the circumstances of the case, "by direction of *this* Court." *Id.* at 506–07.[14]

More generally, there is nothing strange about viewing forum selection as a defense to liability *in a particular court*. One may have a substantive right—even a nonwaivable right—"to impose liability" on another, without having a similar right to "suit in all competent courts." *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 671 (2012) (emphasis omitted). Like venue or personal jurisdiction, forum selection is a

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[14] For example, "[a]t common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim." *Costello* v. *United States*, 365 U.S. 265, 285 (1961) (addressing dismissals based on preconditions to suit). A forum-selection dismissal, like a dismissal for forum non conveniens, arguably "'den[ies] audience to a case on the merits,'" deciding only "that the merits should be adjudicated elsewhere." *Sinochem Int'l* v. *Malaysia Int'l Shipping*, 549 U.S. 422, 432 (2007) (alteration in original; quoting *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999)). On the other hand, if a defendant has already "been put to the trouble of preparing his defense," then barring future actions by the plaintiff may be appropriate. See *Costello*, 265 U.S. at 287; accord Restatement (Second) of Judgments § 20, cmt. *n* (1982) (noting that "estoppel or laches" may bar a second suit when "it would be plainly unfair to subject the defendant to a second action").

good defense in some districts but not others. But unlike those defenses, it is has not been given a special status under Rule 12(b).

* * *

Even if it were more convenient to treat forum selection the way we treat personal jurisdiction or venue, the only lawful method of doing so is to amend the Federal Rules. The Court, acting under § 2072, could always add a new Rule 12(b)(8) defense—"violation of a forum-selection clause"—which could be raised by pre-answer motion, subject to waiver under Rule 12(h), and included among the non-merits grounds in Rule 41(b).

No matter how efficient, however, "such a result 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Jones*, 549 U.S. at 217 (quoting *Leatherman* v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)). Amendments to the Rules require various procedural formalities, designed to secure important substantive interests. See §§ 2073–2074. Courts should not leapfrog this process by skipping over the statutory text and mislabeling forum-selection clauses as "venue." The Rules treat such clauses, by default, as affirmative defenses; and until that changes, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Leatherman*, 507 U.S. at 168–69.

III. The Court Should Assume that the Clause Is Enforceable, Identify the Correct Procedure, Vacate the Judgment, and Leave Remaining Issues To Be Addressed on Remand.

Atlantic Marine and J-Crew agreed that a dispute like this one "shall be litigated" in Norfolk, Va. J.A. 28. The contractual provision embodying that agreement was attached to and incorporated in J-Crew's complaint. J.A. 7–39. If the clause is valid and enforceable, then the complaint on its face revealed a reason why the court in which it was filed (namely, the U.S. District Court for the Western District of Texas) should not grant relief. In other words, the complaint "fail[ed] to state a claim upon which relief can be granted," and could have been dismissed under Rule 12(b)(6).

The facts of this case, however, raise two complications that the Court may wish to avoid.

First, the case arises under state law, and there is much uncertainty over which body of law governs the enforcement of forum-selection clauses under *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Because the case may be decided without resolving that question, the Court should assume, without deciding, that the clause is valid and enforceable under the relevant body of law.

Second, Atlantic Marine made its Rule 12(b) motion under the label of venue, not failure to state a claim. Whether that was adequate to preserve the issue should be left to the court of appeals to decide in the first instance. That court issued its judgment

on the erroneous assumption that § 1404 transfer was the only available remedy. Pet. App. 5a. The judgment should therefore be vacated and the case remanded for further proceedings.

A. The Court should assume, without deciding, that the clause at issue here is valid and enforceable.

Atlantic Marine assumes that the enforcement of a forum-selection clause in federal court (even in a diversity case) is governed by federal law, and in particular by the standards enunciated in *The Bremen*. See Pet. Br. 5, 13, 17. That is a controversial position, and the Court need not adopt it here.

Most private contracts containing forum-selection clauses are governed by state law. The Court has never decided whether the enforcement of a forum-selection clause on a state-law claim is likewise a matter of state contract law, cf. *Stewart*, 487 U.S. at 38–41 (Scalia, J., dissenting)—and, if so, of which State, see Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 Fordham L. Rev. 291, 332–39 (1988)—or whether it is so "essential" to the federal courts as to require a federal answer, cf. *Byrd* v. *Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958).[15] This *Erie* question

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[15] In *Ferens* v. *John Deere Co.*, a parenthetical dictum described *Stewart* as "holding that federal law determines the validity of a forum selection clause." 494 U.S. 516, 526 (1990). That dictum must be understood in context, namely as explaining how § 1404 effectively "pre-empt[s] state law" by enabling transfers among federal courts that would be impossible in a state

needs answering regardless of the procedural device employed, contra Pet. Br. 18 n.6, and it has produced yet another split among the courts of appeals.[16] The Court has also never expressly stated whether, if federal law applies, the relevant standards are those identified in *The Bremen* and *Shute*—which were both admiralty cases and which limited their analysis accordingly. See *Shute*, 499 U.S. at 590 ("[T]his is a case in admiralty, and federal law governs the enforceability of the forum-selection clause we scrutinize."); *The Bremen*, 407 U.S. at 10 ("We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty.").

Here, J-Crew asserts claims solely under Texas

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system. 494 U.S. at 526. *Stewart* deliberately sidestepped the *Erie* issue, because the case happened to arise on a § 1404 motion, which applies a different legal standard under which the clause is merely one more fact to consider. See 487 U.S. at 28–29. Even a clause that is wholly unenforceable under the relevant law—say, because that law requires special formalities, like the signatures of seven witnesses in red ink—might still be a "significant factor" in the § 1404 analysis if it adequately reflects "the parties' private expression of their venue preferences," *id.* at 29–30. Likewise, even a clause that is fully binding on the parties might not justify § 1404 transfer if the relevant public-interest factors counsel against it. See *id.* at 30–31; Pet. Br. 25. Because § 1404 applies the same multifactor analysis to federal- and state-law claims, *Stewart* did not need to answer the *Erie* question, and so it did not. See 487 U.S. at 26 n.3.

[16] Compare, *e.g.*, *Albemarle Corp.* v. *AstraZeneca UK Ltd.*, 628 F.3d 643, 650 (CA4 2010) (federal law), with *IFC Credit Corp.* v. *United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 991 (CA7 2008) (state law).

law. J.A. 9–14. Unlike in *Stewart*, there is no federal statute or rule to apply. Fortunately, however, the Court need not "wade into *Erie*'s murky waters" yet. *Shady Grove*, 130 S. Ct. at 1437. The district court found the forum-selection clause to be consistent with Texas contract law, see Pet. App. 31a, and J-Crew chose not to contest that determination in the court of appeals, see Response to Petition for Writ of Mandamus in No. 12-50826 (CA5), pp. 10–13, or in its brief in opposition. (J-Crew claimed that Texas has "a strong interest in having local construction disputes decided [there]," and cited the state statute the district court found inapplicable, but it declined to argue that Texas law actually forbids enforcement. BIO 4 n.2 (citing Tex. Bus. & Com. Code § 272.001). Nor did J-Crew argue that the clause was invalid or unenforceable under federal standards. See BIO 10–11. Under this Court's Rule 15.2, J-Crew has forfeited any argument that the clause is unenforceable.

For the purposes of this case, then, the Court may assume that the clause is valid and enforceable, whether or not federal courts should generally apply *The Bremen*'s standards to state-law claims—or even to federal claims outside admiralty.

B. The Court should leave all preservation issues for the court of appeals in the first instance.

As noted above, Atlantic Marine framed its motion to dismiss under Rule 12(b)(3) rather than 12(b)(6). J-Crew accordingly argues that a 12(b)(6) theory—and, presumably, the affirmative-defense procedure more generally—is "not properly before the

Court on the merits." BIO 2 n.1; see *id.* at 12–13 & n.6. Because the label of the motion does not always control, these preservation issues should be left for the court of appeals to decide in the first instance.

Atlantic Marine's Rule 12(b) motion to dismiss argued that J-Crew's suit violates a valid and enforceable forum-selection clause. J.A. 48–50. The substance of those arguments would be the same regardless of which 12(b) label they bore. When enforcing forum-selection clauses in motions to dismiss, appellate courts are not always "bound by the label employed below"—especially given the confused state of the law. *Lambert* v. *Kysar*, 983 F.2d 1110, 1112 n.1 (CA1 1993). The court of appeals had previously held that, "[a]s a general matter, the caption on a pleading does not constrain the court's treatment of a pleading," and it has applied this principle to construe motions without regard to their captions. *N. Alamo Water Supply Corp.* v. *City of San Juan*, 90 F.3d 910, 918 (CA5 1996) (*per curiam*) (Rule 59(e) motion).[17] It could equally have chosen to do so here.

The court of appeals did not consider this possibility, in part because it "agree[d]" with the district court that "when a forum-selection clause designates a specific federal forum * * * , a motion to transfer under § 1404(a) is the proper procedural

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[17] Cf. 5C Wright & Miller § 1378, at 380 ("In accordance with the basic philosophy of the federal rules, the general attitude of the courts has been that a Rule 12(e) motion need not be filed under a technically correct label for it to be considered as one by the court.").

mechanism for enforcing the clause." Pet. App. 5a. But if Atlantic Marine would be entitled to dismissal, this Court may vacate a judgment founded on an "erroneous view to the contrary." *United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313, 2330–31 (2011). The court of appeals may then decide, on a correct view of the law, whether to look past the caption and engage the substance of Atlantic Marine's original motion. As this is a Court of "review, not of first view," *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (internal quotation marks omitted), it is enough for this Court to identify the proper procedure, vacate the judgment, and remand the case to the court of appeals.[18]

Atlantic Marine has not relied on the affirmative-defense procedure in its brief to this Court. See Pet. Br. 17–18. Yet the Court may still frame the legal issues properly, whether or not that framing is urged by the parties. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). And when an argument falls squarely within the Question Presented and is hardly

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[18] That court may also consider, *e.g.*, whether this relabeling is appropriate on a petition for mandamus, see *Cheney* v. *U.S. Dist. Ct.*, 542 U.S. 367, 380–81 (2004), or whether any error in the district court could be adequately remedied on appeal, see *Lauro Lines*, 490 U.S. at 501.

"foreign to the parties," *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) (plurality opinion), it is no barrier that the argument is presented only by an *amicus curiae*. See *id.*; see also, *e.g.*, *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 309–10 (1999).

If possible, the Court should correctly resolve the multidirectional circuit split that necessitated the grant of certiorari. If the Court is reluctant to discuss the affirmative-defense procedure, *amicus* respectfully urges that the Court make that reluctance explicit. An opinion that does no more than find Rule 12(b)(3) or § 1406 motions inappropriate, without explicitly clarifying what other procedures might still be available, will at best leave portions of the many-sided split in place. At worst, it may be misunderstood as endorsing § 1404—or a separate suit for damages—as the only available means of relief.[19]

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[19] Because Atlantic Marine requested dismissal, not just transfer, the Court should reach these issues regardless of how it resolves the second Question Presented. No matter how favorable the burden of proof, limiting the remedy to § 1404 effectively rewards a plaintiff's breach of contract. Pet. Br. 20.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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APPENDIX

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28 U.S.C. § 1390

Scope

(a) VENUE DEFINED.—As used in this chapter, the term "venue" refers to the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general, and does not refer to any grant or restriction of subject-matter jurisdiction providing for a civil action to be adjudicated only by the district court for a particular district or districts.

(b) EXCLUSION OF CERTAIN CASES.—Except as otherwise provided by law, this chapter shall not govern the venue of a civil action in which the district court exercises the jurisdiction conferred by section 1333, except that such civil actions may be transferred between district courts as provided in this chapter.

(c) CLARIFICATION REGARDING CASES REMOVED FROM STATE COURTS.—This chapter shall not determine the district court to which a civil action pending in a State court may be removed, but shall govern the transfer of an action so removed as between districts and divisions of the United States district courts.

28 U.S.C § 1391

Venue generally

(a) APPLICABILITY OF SECTION.—Except as otherwise provided by law—

(1) this section shall govern the venue of all civil actions brought in district courts of the United States; and

(2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) VENUE IN GENERAL.—A civil action may be brought in—

(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

(c) RESIDENCY.—For all venue purposes—

(1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;

(2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and

(3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

(d) RESIDENCY OF CORPORATIONS IN STATES WITH MULTIPLE DISTRICTS.—For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

(e) ACTIONS WHERE DEFENDANT IS OFFICER OR EMPLOYEE OF THE UNITED STATES.—

(1) IN GENERAL.—A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an

agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

(2) SERVICE.—The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) CIVIL ACTIONS AGAINST A FOREIGN STATE.—A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(g) MULTIPARTY, MULTIFORUM LITIGATION.—A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

28 U.S.C. § 1406

Cure or waiver of defects

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

(c) As used in this section, the term "district court" includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

Fed. R. Civ. P. 8

General Rules of Pleading

(a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) DEFENSES; ADMISSIONS AND DENIALS.

(1) *In General.* In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) *Denials—Responding to the Substance.* A denial must fairly respond to the substance of the allegation.

(3) *General and Specific Denials.* A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all

the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation.* A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) *Lacking Knowledge or Information.* A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) *Effect of Failing to Deny.* An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) AFFIRMATIVE DEFENSES.

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;

- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken Designation.* If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) PLEADING TO BE CONCISE AND DIRECT; ALTERNATIVE STATEMENTS; INCONSISTENCY.

(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense.* A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative

statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses.* A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) CONSTRUING PLEADINGS. Pleadings must be construed so as to do justice.

Fed. R. Civ. P. 12

Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a

United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) RESULT OF PRESENTING MATTERS OUTSIDE THE PLEADINGS. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) MOTION FOR A MORE DEFINITE STATEMENT. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and

must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) MOTION TO STRIKE. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) JOINING MOTIONS.

(1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) HEARING BEFORE TRIAL. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Fed. R. Civ. P. 56

Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) TIME TO FILE A MOTION. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) PROCEDURES.

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party

cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a

reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.